

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 50

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KERN RIVER COMPANY, PACIFIC LIGHT AND POWER  
CORPORATION, AND SOUTHERN CALIFORNIA EDISON  
COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

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FILED MAY 10, 1920.

(27,675)

(27,675)

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INDEX.

Original. Print.

Caption .....	a	1
Transcript from the district court of the United States for the southern district of California.....	1	1
Agreed statement of case on appeal.....	1	1
Second amended bill.....	1	1
Exhibit A—Certificate of organization of Kern River Company .....	17	10
Motion to dismiss bill.....	21	12
Answer .....	22	13
Exhibit A—Letter of Kern River Co. to Commissioner General Land Office, September 24, 1897.	40	23

	Original.	Print
B—Letter of Kern River Co. to Herman, November 12, 1897.....	42	24
C—Letter of Herman to register and receiver, April 15, 1898.....	44	26
D—Letter of acting Commissioner to register and receiver, July 29, 1905.....	47	28
E—Application of president of Kern River Co. for right of way, &c.....	50	29
F—Letter of Hitchcock to Commissioner, De- cember 28, 1904.....	52	30
G—Transmission line permit issued by Sec- retary of Agriculture, October 4, 1910...	54	31
Stipulation of agreed facts.....	58	33
Representative examples of water appropriation notices from Exhibit 2.....	69	40
Map .....	71	41
Notice of the Kern River and Los Angeles Electric Power Co. of appropriation of water.....	74	42
Representative examples of water appropriation from Ex- hibit 3.....	75	43
Exhibit No. 4—Certificate of president Kern River Co., &c..	80	46
5—Decree in Miller & Lux vs. Brown Co.....	82	48
7—Certificate of president Kern River Co., &c.	104	60
8—Letter of Secretary of Agriculture to Sec- retary of Interior, March 12, 1908.....	107	62
10—Letter of Assistant Commissioner to Britton & Gray, November 18, 1909.....	109	63
Testimony of A. C. Balch.....	110	63
Memorandum as to power sold, &c.....	114	65
Amendment to second amended bill of complaint.....	115	66
Agreement as to statement.....	117	67
Judge's certificate.....	117	68
Proceedings in U. S. circuit court of appeals.....	118	68
Order of submission.....	119	68
Order of filing opinion, &c.....	120	69
Opinion .....	121	69
Decree .....	131	76
Petition for appeal.....	132	77
Allowance of appeal.....	133	77
Assignment of errors.....	134	78
Stipulation as to agreed statement and bill of exceptions on appeal .....	137	80
Stipulation waiving bonds.....	138	81
Clerk's certificate.....	139	81

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

*Transcript of Record.*

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

In the District Court of the United States in and for the Southern District of California, Northern Division.

No. A.-20, Equity.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, Southern California Edison Company, Defendants.

*Agreed Statement of the Case on Appeal.*

Be it remembered: That on the eleventh day of September, 1914, the plaintiff filed in the above court its bill of complaint, and on the twenty-ninth day of October, 1917, this plaintiff filed in the above court its second amended bill of complaint in the words and figures as follows:

(Title of Court and Cause.)

To the Honorable Oscar A. Trippet, judge of said court:

Comes now the United States of America, by the Attorney General, and said defendant not having responded to the bill heretofore filed herein by said plaintiff, files this, its amended bill of complaint against the said Kern River Company, a corporation, and thereupon complains and shows unto your Honor:

I.

That the defendant, Kern River Company, is a corporation organized and existing under and by virtue of the laws of the State of



Maine, and located at Portland, Cumberland County, in said State of Maine, and is a citizen and resident of said State of Maine, but owning property and doing business in the State of California. That H. S. McKee, of Los Angeles, California, is the duly designated and appointed agent of said corporation in the State of California upon whom process running against said corporation may be served.

## II.

That said corporation is organized for the purpose of building, constructing, maintaining and operating canals, ditches, reservoirs, etc., for carrying, storing and supplying water for the purpose of irrigation and for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railways, tramways, mills and factories with electric and other power and also for the supplying of electric and other power for lighting and heating mines, quarries, mills, factories, incorporated cities and towns, villages, or towns, situated in territory other than the State of Maine, and to acquire by purchase or otherwise, buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power and for any of the purposes or uses above mentioned, and to acquire, or possess, contract for, sell and transfer water and water rights, and to contract for, and sell, in the State of California and elsewhere than in the State of Maine, electric and other power for any purpose whatsoever, as will appear by reference to said articles of incorporation, a copy of which is marked Exhibit "A," hereto attached and made a part of this bill of complaint.

## III.

That on or about the 3d day of June, 1898, said defendant, by its president and secretary, being thereunto duly authorized, in conformity with the rules and regulations of plaintiff's General Land Office as to procedure, applicable thereto, and in the manner required by law, and having theretofore filed with plaintiff's Secretary of the Interior a copy of its said articles of incorporation and due proofs of its organization, filed with the Register and Receiver of plaintiff's local Land Office at Independence, California, said office being the Land Office for the District in which the lands hereinafter described are situated and application for a right of way for a canal, which said application consisted, among other things, of a certain map of survey showing the definite location of said proposed canal upon certain portions of the public domain of plaintiff lying in Townships 25, 26 and 27, South of Ranges 32 and 33 East, Mt. Diablo Meridian, said map, among other lands, including said portions of the public domain of plaintiff described in paragraph VI hereof, and accompanying said map were the field notes of said sur-

veys. Said map was refiled by said defendant in said Land Office on the 3d day of November, 1898.

4

## IV.

That appearing on said map and filed therewith was a certificate in writing, signed by one Chas. Forman as president of said Kern River Company, and attested by one H. S. McKee as secretary, under the seal of said corporation, certifying, among other things, that the survey of said canal as represented on said map and accompanying field-notes, was made under the authority of said company; that said canal as so represented was adopted by said company, by resolution of its board of directors on the 20th day of October, 1897, as the definite location of said canal, describing the same generally therein; that no lake or lake-bed, stream or stream-bed is used for said canal except as shown on said map, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company might obtain the benefits of Section- 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes," and of Section 2 of an Act of Congress approved May 11, 1898, entitled "An Act to amend an Act to permit the use of the right of way through public lands for tram roads, canals and reservoirs and for other purposes," and further certifying that the right of way for said canal was desired solely for the purposes prescribed by the aforesaid Acts. That said application, including said maps, field-notes, and certificate, were thereupon by said Register and Receiver of said plaintiff's local Land Office transmitted to and filed with the Secretary of the Interior of the United States for approval.

5

## V.

That on or about the 14th day of April, 1899, the Secretary of the Interior believing and relying on the representatives so made by said applicant as aforesaid, and believing that said canal was to be used by said defendant for the main purpose of irrigation, and not otherwise, approved, subject to all valid existing rights, said application for said right of way for canal according to the said map and field-notes of said survey, and thereupon, and on or about the 26th day of April, 1899, said right of way as represented by said map was noted upon the plats in said Land Office at Independence, California, by reason of the said approval of said application, and there was thereby granted to the said Kern River Company a right to the use of the right of way in said application, map, field-notes, and said certificate described for the construction, operation and maintenance of a canal for the main purpose of irrigation.

## VI.

That at the date said approved map was filed in said Land Office at Independence, California, and noted on the plats of said Land

Office, the plaintiff was and still is owner, as part of the public domain, of the following described lands:

The Southeast quarter of the Southwest quarter of Section Eight, and the Northeast quarter of the Northeast quarter of Section Thirty, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

6 The Southeast quarter of the Northeast quarter, the East half of the Southeast quarter, the Southwest quarter of the Southeast quarter, and the South half of the Southwest quarter of Section Six, Township Twenty-seven South, Range Thirty-three East, Mt. Diablo Meridian;

The Southeast quarter of the Northeast quarter, the Northeast quarter of the Northwest quarter, the South half of the Northwest quarter, and the Northwest quarter of the Southwest quarter of Section Twelve; the South half of the Northeast quarter, the North half of the Southeast quarter, the South half of the Northwest quarter, the North half of the Southwest quarter and the Southwest quarter of the Southwest quarter of Section Eleven, and the Southeast quarter of Section Ten, all in Township Twenty-seven South, Range Thirty-two East, Mt. Diablo Meridian;

which said lands, prior to the application hereinbefore described, of the defendant Kern River Company for right of way for a canal thereon, were open and subject to location for right of way for a canal by a canal or ditch company under the provisions of Sections 18 to 21, inclusive, of an Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes." All of said lands are situated in the County of Kern, State of California, and within the Northern Division of the Southern District of California. And the said right of way hereinbefore

7 described and represented by said map of definite location crosses over and upon the lands hereinbefore described.

## VII.

That no right, title or interest in or to any grant, tenement, privilege, easement or other benefits provided for by the provisions and conditions of said Act of Congress approved March 3, 1891, in, upon, over or through the lands described in paragraph VI hereof, were ever acquired, by the defendant Kern River Company, except at the time and in the manner and upon the terms and conditions hereinbefore set forth.

## VIII.

That on or about the 19th day of January, 1905, said defendant by its President and Secretary, being thereunto duly authorized, in conformity with the rules and regulations of plaintiff's General Land Office as to procedure, applicable thereto, and in the manner required by law, and having theretofore filed with said Secretary of the Interior a copy of its said articles of incorporation and proofs of or

ganization, filed with the Register and Receiver of plaintiff's Local Land Office at Independence, California, said office being the Land Office for the District in which the lands hereinbefore described are situated, an application for a right of way for a canal, which said application consisted, among other things, of a certain map of survey showing the amended definite location of said proposed canal upon certain portions of the public domain of plaintiff, and which said amended definite location was over a line of route the same as represented on the map mentioned in paragraph III hereof, except in certain particulars shown on said map of amended definite location, said map, among other lands, including the lands described in paragraphs VI and XIV hereof, and accompanying said map were the field-notes of said surveys.

## IX.

That appearing on said map and filed therewith was a certificate in writing, signed by one Charles Forman, as President of said Kern River Company, and attested by one H. S. McKee, as Secretary, under the seal of said corporation, certifying, among other things, that the survey of said canal as represented on said map and accompanying field-notes, was made under the authority of said company; that said canal as so represented was adopted by said company by resolution of its board of directors on the 23d day of January, 1905, as the amended definite location of said canal, describing the same generally therein, that no lake or lake-bed, stream or stream-bed is used for said canal except as shown on said map, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company might obtain the benefits of Sections 18 to 21 inclusive of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes," and Section 2 of the Act of Congress approved May 11, 1898, and that the right of way described on said map was desired for public purposes. Said map contained another certificate signed by

Charles Forman as President of Kern River Company and attested by H. S. McKee as Secretary, under the seal of said corporation, in which the said Charles Forman certified that he was the President of said Kern River Company, and that the canal described was actually constructed as set forth in the affidavit of G. O. Newman, chief engineer, appearing on said map on the exact location represented on the map and by the field-notes, approved by the Secretary of the Interior on the 14th day of April, 1899, referred to in Paragraph III of this bill, except in so far as the route indicated upon the map of the amended definite location differs therefrom and that the company in all things complied with the Act of Congress of March 3, 1891, granting the rights of way for canals, ditches, etc., on the public lands of the United States. That on said map also appeared the affidavit of one G. O. Newman, subscribed and sworn to before Charles C. Taylor, notary public in and for Kern County, on the 14th day of January, 1905, stating that he was the chief engineer of said Kern River Company; that the canal of said Kern

River Company described upon said map was constructed under his survey. That construction was commenced on the 31st day of July, 1902, and completed on the 5th day of April, 1904. That the constructed canal as aforesaid conforms to the amended map and field-notes upon which said affidavit appeared, which conformed to the original location which received the approval of the Secretary of the Interior on the 14th day of April, 1899, except as indicated upon said map of amended definite location.

10

X.

That said application, including said maps, field-notes, certificates and affidavit, were thereupon by said Register and Receiver of said plaintiff's local Land Office, transmitted to and filed with the Secretary of the Interior of the United States for approval.

XI.

That on or about the 27th day of November, 1905, the Secretary of the Interior approved, subject to all valid existing rights, said application for said right of way for canal, according to the said map and field-notes of said survey, believing and relying on the representations so made by said applicant, as alleged in paragraphs III, IV, VIII, and IX herein, that said canal was to be used by said defendant for irrigation and public purposes, and not otherwise, whereas in fact said representations were untrue and false, in this, that the said defendant did not intend to use said canal for irrigation or public purposes but intended to use said canal solely for the purpose of generating electrical power for sale, and the President of said defendant had entered into an agreement under date of December 23, 1904, with Miller and Lux et al., in which said defendant agreed that all the water diverted by it in said canal should be used solely for the purpose of generating power and for no other purpose.

XII.

That the Secretary of the Interior, being deceived by said false representations, approved said application and thereupon on or about the 19th day of January, 1905, said right of way as represented by said map was noted upon the plats in said Land Office at Independence, California, and by reason of the said approval of said application there was granted to the said Kern River Company a right to the use of the right of way in said application, map, field-notes, and said certificate described, for the construction, operation and maintenance of a canal for the purpose of irrigation, whereby great detriment and injury was suffered by the plaintiff in that the defendant secured a grant of the public domain under the Act of March 3, 1891, for a purpose contrary to said Act.

11

## XIII.

Plaintiff further states that the general line of said proposed canal, as shown by both of said maps and the corresponding field-notes, is as follows: Beginning at a point in the north half of the southwest quarter of Section Thirty-three, Township Twenty-five South, Range Thirty-three East, Mt. Diablo Meridian, thence in a southwesterly direction through the south half of said Section Thirty-three, and through the northwest quarter of Section Four, and the east half of Section Five, Township Twenty-six South, Range Thirty-three East, thence in a southerly and westerly direction through Townships Six and Seven South, of said Range Thirty-three East, and through Townships Twelve, Eleven and Ten of Township Twenty-seven South, Range Thirty-two East, Mt. Diablo Meridian, to a point in the southwest quarter of the southeast quarter of said Section Ten.

That for a more specific description of said lines of route of said canal and the matters and things appearing on said maps, plaintiff refers to said maps and corresponding field-notes which are hereby made a part of this bill by reference.

## XIV.

That at the date said approved map was filed in said Land Office at Independence, California, and noted on the plats of said Land Office, in addition to the lands described in paragraph VI hereof, the plaintiff was and still is owner, as part of the public domain, of the following described lands:

The Southeast quarter of the Southwest quarter of Section Thirty-three, Township Twenty-five south, Range Thirty-three East, Mt. Diablo Meridian; The Northeast quarter of the Northwest quarter of Section Four, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The Northeast quarter of the Southeast quarter of Section Five, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The Northeast quarter of the Northwest quarter; the South half of the Northwest quarter; and the West half of the Southwest quarter of Section Seventeen, township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The East half of the Southeast quarter of Section Nineteen, Township Twenty-six South, Range Thirty-three East, Mt. Diablo Meridian;

The North half of the Northwest quarter of Section Seven, Township Twenty-seven South, Range Thirty-three East, Mt. Diablo Meridian;

The Northwest quarter of the Northeast quarter of Section Twelve, Township Twenty-seven South, Range Thirty-two East, Mt. Diablo Meridian;

which said lands, prior to the application hereinbefore described of the defendant Kern River Company for right of way for a canal

thereon, were open and subject to location for right of way for a canal by a canal or ditch company under the provisions of Sections 18 to 21, inclusive, of an Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes." All of said lands are situated in the County of Kern, State of California, and within the Northern Division of the Southern District of California. And the said right of way hereinbefore described and represented by said map of amended definite location crosses over and upon the lands described in this paragraph and in paragraph VI hereof.

#### XV.

That no right, title or interest in or to any grant, tenement, privilege, easement or other benefits provided for by the provisions and conditions of said Act of Congress, approved March 3, 1891, in, upon, over or through the lands described in paragraphs VI and XIV hereof, were ever acquired by the defendant Kern River Company, except at the time and in the manner and upon the terms and conditions hereinbefore set forth.

#### XVI.

14 That at the times said Kern River Company filed said maps for approval and at the time said maps were approved and noted on the plats of said Land Office, as aforesaid, the said Kern River Company had no valid appropriation of its own of any water for the purpose of irrigation that could be carried through a canal constructed upon said right of way, nor did it intend at the time of the acquisition of said right of way to construct any canal thereon for the purpose of irrigation, but said company constructed, and intended to construct, said canal, solely for the purpose of carrying water to be used in generating electric power, and not otherwise.

#### XVII.

That the approval of said Secretary of the Interior of the maps and applications hereinbefore mentioned was given solely by reason of the facts alleged in paragraphs III, IV, V, VIII and IX herein, through mistake, error and inadvertence in the belief that said canal was to be used for the main purpose of irrigation and that the canal would be so used by the defendant and there was attached to said grant the implied condition that said canal was to be used for the purpose of irrigation.

#### XVIII.

That said defendant has never used said canal for the purposes of irrigation, but has ever used and now uses the same solely for the purpose of carrying water to be used to generate electric power which the said canal company sells mainly for the purpose of furnishing motive power to certain electric railway systems in and around cer-



tain municipalities in said Southern Division of the Southern District of the State of California, and for supplying light for different municipalities throughout said Southern District of California, a small part of the electricity generated by said company being sold by said company to ranchers in the Kern River Valley, who utilize said power for the purpose of pumping water to be used in irrigating their ranches.

## XIX.

That on or about the 27th day of March, 1908, plaintiff's then Secretary of the Interior, through the Register and Receiver of plaintiff's local Land Office at said Independence, California, served notice upon said defendant Kern River Company, to show cause, within ninety days from date of said notice, why proceedings should not be instituted to cancel said grants of right of way upon the ground that the same were secured by the approval of said maps for the main purpose of irrigation, but were used solely for power purposes.

That thereafter, and in pursuance of said notice, said Kern River Company made answer to said notice showing its reasons why said proceedings should not be instituted.

That thereafter, and on or about the 18th day of November, 1909, the Assistant Commissioner of plaintiff's General Land Office, in pursuance of the decision of November 12, 1909, and of instructions in that behalf theretofore given by the First Assistant Secretary of the Interior, gave notice to said defendant Kern River Company that it would be given sixty days within which to further amend its said amended application appearing on the map filed January 19, 1905, for right of way, so as to bring the same within the provisions of the Act of February 15, 1901 (31 Stats. 790), (under which said Act said defendant was at the time of filing its said amended application, and now, is, entitled to a permit for a right of way for its said canal), provided said amended application should be accompanied by a proper relinquishment of all right and interest under the approvals given under the said Act of 1891.

That defendant has failed, neglected and refused to file such amended application, or any application at all for right of way under said Act of February 15, 1901.

Wherefore, and inasmuch as plaintiff is without full and adequate remedy at law, plaintiff prays that defendant be required to answer the premises by subpoena of this court, not under oath however, an answer under oath being hereby expressly waived, and that a hearing on the matters herein set forth may be had, and that a decree may be entered herein in favor of plaintiff setting aside the action of the Secretary of the said Interior in approving said maps, and vacating, cancelling and annulling the grant of right of way over plaintiff's said lands, acquired by said defendant by virtue of the proceedings set forth herein, and forever quieting and confirming in plaintiff, the title to said lands, as against any claim of right,



title or interest to or in the same or any part thereof by virtue of said proceedings, by said defendant, or anyone claiming under it, and enjoining said defendant from thereafter using said right of way so obtained until it has made application for the same and received the approval of the Secretary of the Interior under the said Act of February 15, 1901, and for such other and further relief as to the Court may seem just and equitable.

THOMAS WATT GREGORY,  
*Attorney General of the United States;*  
 J. ROBERT O'CONNOR,  
*United States Attorney;*  
 CLYDE R. MOODY,  
*Assistant United States Attorney,*  
*Attorneys for Plaintiff.*

### EXHIBIT "A."

#### *Certificate of Organization of Kern River Co.*

#### STATE OF MAINE:

#### Certificate of Organization of a Corporation under the General Law.

The undersigned officers of a corporation organized at Portland, Maine, at a meeting of the signers of the articles of agreement therefor, duly called and held at the office of Charles F. Libby, 57 Exchange St., in the City of Portland, on Monday the twenty-eighth day of June A. D. 1897, hereby certify as follows:

The name of said corporation is Kern River Company.

The purposes of said corporation are, to carry on the business of building, constructing, maintaining and operating canals, ditches, reservoirs, dams, flumes, aqueducts, pipes and pipe-lines for carrying, storing and supplying water for the purpose of irrigation; also the building, constructing, maintaining and operating canals, ditches, reservoirs, dams, flumes, aqueducts, pipes and pipe-lines, for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railroads, tramways, mills and factories situated in territory other than the State of Maine, with electric and other power, and also for the supplying of electric and other power to light and heat mines, quarries, mills, factories, incorporated cities, cities and counties, villages or towns, situated in territory other than the State of Maine; and to acquire by purchase or otherwise, from corporations, partnerships and persons, for any or all of the above purposes, properties, rights, franchises, easements and lands; and to acquire by purchase or otherwise buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power, and for any of the purposes or uses above set forth, in territory other than the State of Maine; and to acquire, own, possess, contract for,

sell and transfer water and water rights, and to contract for and sell in the State of California and elsewhere than in the State of Maine, electric and other power for any purpose whatsoever, and also when deemed necessary or expedient to accomplish any of the purposes hereinabove specified, to sell, transfer, exchange, mortgage, pledge, or otherwise dispose of or encumber any or all of the property of said corporation.

The amount of capital stock is Two Million Five Hundred Thousand Dollars.

The amount of capital stock already paid in is nothing.

19 The par value of the shares is one hundred dollars.

The names and residences of the owners of said shares, are as follows, including stock in treasury unissued:

Names.	Residences.	No. of shares.
Charles F. Libby.....	Portland, Maine.....	One Share
Frank W. Robinson.....	Portland, Maine.....	One Share
Harry Butler .....	Portland, Maine.....	One Share
Frank H. Colley.....	Portland, Maine.....	One Share
Levi Turner .....	Portland, Maine.....	One Share

Unissued in Treasury, 24,995 shares.

Said corporation is located at Portland, in the County of Cumberland.

The number of directors is five, and their names are, Charles F. Libby, Frank W. Robinson, Levi Turner, Harry Butler, and Frank H. Colley. The undersigned Levi Turner is clerk, and his residence is Portland, Maine. The undersigned Charles F. Libby, is President; the undersigned Levi Turner is Treasurer; and the undersigned Charles F. Libby, Frank W. Robinson, Levi Turner, Harry Butler and Frank H. Colley are all of the directors of said corporation.

Witness our hands this twenty-eighth day of June, A. D. 1897.

CHARLES F. LIBBY,

*President.*

LEVI TURNER, *Treasurer.*

CHARLES F. LIBBY,

FRANK W. ROBINSON,

LEVI TURNER,

HARRY BUTLER,

FRANK H. COLLEY,

*Directors.*

20 STATE OF MAINE,  
Cumberland, ss:

Portland, Maine, June 28, A. D. 1897.

Then personally appeared Charles F. Libby, Frank W. Robinson, Levi Turner, Harry Butler and Frank H. Colley, and severally made oath to the foregoing certificate, that the same is true.

Before me,

JOSHUA C. LIBBY,  
*Justice of the Peace.*

STATE OF MAINE,  
Attorney General's Office:

June 29th, A. D. 1897.

I hereby certify that I have examined the foregoing certificate, and the same is properly drawn and signed and is conformable to the constitution and laws of the State.

WILLIAM T. HAINES,  
*Attorney General.*

STATE OF MAINE,  
Office of Secretary of State:

I hereby certify that the foregoing is a true copy from the records of this office.

In witness whereof, I have caused the seal of the State to be hereunto affixed.

Given under my hand at Augusta, this first day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and in the one hundred and twenty-first year of the Independence of the United States of America.

21

[SEAL.]

BYRON BOYD,  
*Secretary of State.*

[Endorsed:] 4064. Filed in the office of the Secretary of State, the 27th day of February, A. D. 1902. C. F. Curry, Secretary of State. B. J. Hoesch, Deputy.

That thereafter, and on the 2d day of November, 1917, the defendant filed in said court a motion to dismiss said bill of complaint in the words and figures as follows:

(Title of Court and Cause.)

*Motion of Defendant to Dismiss Bill.*

Now comes the defendant, and by this motion, moves to dismiss the second amended bill of complaint filed October 29th, 1917, in the above-entitled cause on the following grounds, to wit:

First. Because it appears from said bill that the court has no jurisdiction of the subject matter of said bill, in that there is no legislative provision or law in force to authorize the institution of the suit, or any action by the court in the premises.

Second. Because it appears by the said second amended bill, that plaintiff is not entitled to the, or any, relief prayed for in and by said amended bill against this defendant.

Third. Because it appears by said second amended bill that more than six years elapsed from the date of the grant of the right of way described in the said amended bill, before this suit was brought or filed, and said suit is and was, prior to the bringing thereof, barred by the provisions of Section 8 of the Act of March 3d, 1891 (26 U. S. Stats. at Large, p. 1099).

H. H. TROWBRIDGE,

GIBSON, DUNN & CRUTCHER,

*Solicitors and Attorneys for Defendant.*

JAS. A. GIBSON,

*Of Counsel.*

That thereafter said motion came on regularly to be heard in said Court sitting at Los Angeles, California, was duly argued by counsel for the respective parties and submitted to the Court for its decision and thereafter was by the Court denied.

That on April 25, 1916, the defendant duly served on the solicitors for the plaintiff and filed in said Court its answer to said bill of complaint, which was in the words and figures as follows:

(Title of Court and Cause.)

*Answer.*

The Answer of the Kern River Company, a Corporation, Defendant, to the Second Amended Bill of Complaint of Plaintiff, Filed Herein on the 29th Day of October, 1917.

This defendant now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

#### I.

Defendant believes the statements contained in the paragraphs numbered respectively I, II, III, and IV to be true.

#### II.

This defendant admits paragraph V of said amended bill, except in the particulars or respect hereinafter mentioned, that is to say,

that the Secretary of the Interior, on or about the 4th day of April, 1899, "believing or relying on the representations so made by said applicant as aforesaid, and believing that said canal was to be used by said defendant for the main purpose of irrigation and not otherwise, approved, subject to all valid and existing rights said application for said right of way of canal, according to the said map and field-notes of said survey"; and this defendant does not know and cannot set forth as to its belief or otherwise, whether or not it is true that the Secretary of the Interior, on the date set forth, believed or relied on the alleged representations so made by the applicant as stated in said bill, that said canal was to be used by said defendant for the main purpose of irrigation, and not otherwise; and also this defendant does not know and cannot set forth as to its belief, or otherwise, whether or not it is the fact as stated in said paragraph V of said amended bill, that the right to the use of the right of way granted to this defendant for a canal was for the construction or operation or maintenance for a canal for the main or sole purpose of irrigation.

24

## III.

This defendant admits paragraph VI of plaintiff's amended bill, except that in addition thereto defendant alleges that the portion of the public domain therein described is and was, since the granting thereof, subject to the right of way and use of defendant's canal.

## IV.

As to paragraph VII this defendant denies that no right or title or interest in or to any grant or tenement or privilege, easement, or other benefits provided for by the provisions and conditions of the said act of Congress, approved March 3d, 1891, in or upon or over or through the lands described in paragraph VI of plaintiff's said amended bill of complaint, were ever acquired by the defendant Kern River Company except at the time and in the manner and upon the terms and conditions thereinbefore set forth in plaintiff's said amended bill; and this defendant alleges that on, and for a long time prior to its aforesaid application for said right of way for a canal, it was the owner, by itself and predecessors in interest, of certain water rights, and the right to divert and use for purposes of irrigation and other beneficial uses the waters of the Kern River in said Kern County, California; and that it had, by itself and its predecessors in interest, diverted and used the waters of said river for domestic and irrigation purposes upon lands in said Kern County, under and by virtue of the Act of Congress approved July 26th, 1866

(Rev. Stats., sec. 2339), and the Act of Congress approved  
25 March 3d 1877, to provide for the sale of desert land in certain states and the appropriation of water, and the customs and decisions of courts of the State of California, under and pursuant to Title VIII, Division II, of the Civil Code of California.

## V.

This defendant admits paragraph VIII of plaintiff's said amended bill.

## VI.

This defendant admits paragraph IX and paragraph X of plaintiff's said amended bill.

## VII.

This defendant admits that the allegations of paragraph XI are true, except in the following particulars: That this defendant has no personal knowledge that the Secretary of the Interior approved said application, believing or relying on the representations made by the applicant as alleged in paragraphs III, IV, VIII, IX, or either of them, of said amended bill, that said canal was to be used by said defendant for irrigation, and not otherwise, and this defendant denies that said alleged representations or any representations made by this defendant in its application for said right of way referred to in said paragraph XI were untrue or false, or that this defendant did not intend to use the said canal referred to in said paragraph, for irrigation or public purposes, but intended to use the said canal solely for the purpose of generating electrical power for sale, but admits that defendant entered into the agreement of December 23d, 1904, with Miller & Lux et al., referred to in said paragraph XI of said amended bill of complaint.

26

## VIII.

This defendant admits paragraph XII of plaintiff's said amended bill except that this defendant denies that the approval of the right of way represented by the map referred to in said paragraph was secured by any deception practiced upon, or any false representations made by defendant to, the Secretary of the Interior, or any other federal officer; or that by reason of the said approval of said application for the right of way, or the right to the use of the right of way, referred to in said paragraph, there was granted to this defendant the right to use the right of way in said application for the purpose of irrigation alone; and this defendant further denies that great or any detriment or any injury whatever was suffered by the plaintiff in that this defendant secured a grant of the public domain under the Act of March 3d, 1891, for a or any purpose contrary to said Act. And defendant avers that said right of way for said canal was not obtained from plaintiff or its Department of the Interior by any deception, fraud or misrepresentation.

## IX.

This defendant admits paragraph XIII of plaintiff's said amended bill.

## X.

This defendant admits that plaintiff was and is the owner, as part of the public domain, of the land described in paragraph XIV of said amended bill of complaint, subject to defendant's right of way thereover, for its aforesaid canal, and the use of such right of way for said canal; and this defendant says that the said land  
27 described in said paragraph was also open and subject to location for a right of way for a canal, under the provisions of Section 2 of the Act of Congress approved May 11th, 1898, entitled: "An Act to amend an Act to permit the use of a right of way through public lands for tramroads, canals and reservoirs, and for other purposes."

## XI.

This defendant denies that no right or title or interest in or to any grant or tenement or privilege or easements, or other or any benefits provided for by the provisions and conditions of said Act of Congress approved March 3, 1891, in or upon or over or through the lands described in paragraphs VI and XIV hereof, were ever acquired by the defendant Kern River Company, except at the time and in the manner, or upon the terms or conditions, set forth in plaintiff's said amended bill; but this defendant alleges that it acquired the right, title, estate and interest and grant of a right of way in and to and over the lands described in plaintiff's said amended bill for its said canal and the use thereof as hereinafter alleged in the second, separate defense.

## XII.

That at the times said Kern River Company filed said maps for approval, and at the time said maps were approved and noted on the plats of said Land Office as stated in plaintiff's said amended bill, this defendant denies that the Kern River Company had no valid appropriation of its own of any water for the purpose of irrigation, that could be carried through a canal constructed upon said  
28 right of way, and further denies that it did not intend at the time of the acquisition of said right of way for said canal; to construct any canal thereon for the purpose of irrigation, and further denies that said Company constructed or intended to construct said canal solely for the purpose of carrying water to be used in generating electric power, and not otherwise, except as limited in said contract with Miller & Lux et al. This defendant alleges that it was the owner of water rights and using such water for irrigation as hereinbefore alleged, and that in constructing its said canal it intended to divert and use the same for irrigation as well as for other beneficial uses, including the generation of electric energy as hereinafter stated.

## XIII.

This defendant does not know, and cannot set forth as to its belief or otherwise, whether or not it is the fact as stated in paragraph XVII of plaintiff's said amended complaint that the approval of the Secretary of the Interior of the maps and applications therein referred to, was given solely or at all by reason of the facts alleged in paragraphs III, IV, V, VIII and IX of said amended complaint, through mistake, or error, or inadvertence, in the belief that said canal was to be used for the main purpose of irrigation, and that the canal would be so used by the defendant; and this defendant denies that there was attached to the said grant of the right of way of said canal the implied or any condition that said canal was to be used for the purpose of irrigation or irrigation only. And defendant denies

29 that the Secretary of the Interior in approving or making the grant for said right of way for said canal, did so by or through any mistake, error, or inadvertence.

## XIV.

This defendant admits that it has never used said canal for the purpose of irrigation, but has ever used and now uses the same solely for the purpose of carrying water to be used to generate electric power which the said canal company sells mainly for the purpose of furnishing motor power to certain electric railway systems in and around certain municipalities in said southern division of the southern district of the state of California, and for supplying light for different municipalities throughout said southern district of California; but this defendant says that a large part of the electricity generated by the said company is being sold by said company to farmers and ranchers, along the line of the electric power distributing system of this defendant, which said power is used for the purpose of pumping water to be and which is used for irrigating land.

## XV.

This defendant admits paragraph XIX of plaintiff's said amended complaint.

For a further, separate and second defense this defendant, Kern River Company, avers:

## I.

That there was granted to it, as a corporation, by the United States, a right of way for a canal for the purposes of diverting and conveying water through the same for the generation of electric power, and for irrigation, under and in virtue of the provisions of Sections 18 to 21, inclusive, of an Act of Congress approved March 3d, 1891, entitled: "An Act to repeal timber culture laws and for other purposes," and the provisions of Section 2 of an



Act of Congress approved May 11th, 1898, entitled: "An act to amend an Act to permit the use of a right of way through public lands, for tramroads, canals and reservoirs, and for other purposes"; that said canal is located upon and extends over the public land of the United States described in paragraph VI of plaintiff's said amended bill of complaint, and that the general line of said canal is as set forth and described in paragraph XIII of plaintiff's said amended bill. That the manner in which this defendant, Kern River Company, acquired the aforesaid grant of the right of way for said canal was and is as follows:

## II.

The said Kern River Company, on or about the 24th day of September, 1897, desiring to procure a right of way for reservoir, diversion canal, and construction trail, and for two lines of poles for transmission of electric power, wrote a letter of inquiry to the Commissioner of the General Land Office, describing the application for the right of way which it desired to make, and stating the purposes for which it was incorporated. A copy of this letter is set forth hereinafter as a part hereof, and marked Exhibit "A."

## III.

That thereafter, by letter dated November 12th, 1897, the Kern River Company made application to the Commissioner of the General Land Office, for right of way for reservoir and diversion canals and construction trail, and for two pole lines to carry wire for the transmission of electric power, all as described in said letter. That said maps, five in number, were described in and accompanied said letter, and said letter is hereinafter set forth as a part hereof, and marked Exhibit "B." That to the said application of November 12th, 1897, the Commissioner of the General Land Office replied by letter to the Register and Receiver of the Visalia Land Office, dated April 15th, 1898, pointing out certain defects in the aforesaid maps that would have to be remedied, and stating that the right of way sought for the canal, could not be granted under the Acts of March 3d, 1891, and May 14th, 1896, as sought, and stated on said maps; a copy of which letter is hereinafter set forth as a part hereof, and marked Exhibit "C."

## IV.

That thereafter the Kern River Company, defendant, reformed its application and corrected said maps and made a new application for rights of way for the aforesaid purposes, under and to conform to Sections 18 to 21 of the Act of March 3d, 1891, and Section 2 of the Act of May 11th, 1898. In this application the said defendant company stated that the use to which the canal was to be devoted was as follows: "Right of way for a canal for the purpose of irrigation and the subsidiary purpose of the development of power as particu-

32 lary described in the map filed herewith, marked Exhibit "F." A copy of said map was filed in the United States District Land Office at Visalia, California, May 25th, 1898, and in the United States District Land Office at Independence, California, June 3d, 1898. That after consideration by the Department of the Interior as to the proposed use of the right of way sought, the aforesaid application was approved by E. A. Hitchcock, Secretary of the Department of the Interior, on April 14th, 1899.

## V.

And this defendant, relying upon the grant of said right of way for said canal, made on the 14th day of April, 1899, in good faith began, on the 31st day of July, 1902, the construction of a canal upon the right of way so granted to it, and completed said canal on or about the 31st day of December, 1904, and also in the meantime it constructed and completed, upon rights of way granted to it by plaintiff, two electrical transmission lines, and a power house for the generation of electrical power and energy, with water carried by and through said canal.

That said canal has an approximate capacity of 30,000 miner's inches of water, and is about eleven miles in length, and from 24 feet to 32 feet in width on top, and 15 feet to 23 feet in width on bottom, and 9 feet in depth, and throughout its entire length, excepting where it is connected with wooden flumes across the Kern River and other ravines is lined and fortified with cement construction to give said canal stability and impermeability. That the lower terminus of said canal connects with the power-house located on the southeast quarter of Section 10, Township 27 South, of Range 32

33 East, M. D. M., and on this power-house site is erected hydroelectric generating house and appurtenances; and the equipment of the power-house consists of four 3,600 h. p. and one 3,200 h. p. water-wheels operating under a static head of 232 feet, each wheel being directly connected to a 2,000 k. w. 3-phase 50-cycle 2,200-volt generator. The capacity of the generating plant in kilowatts is 10,000, equal to 13,405 h. p. Said canal and said generating plant, exclusive of the transmission line, cost about \$1,937,000. The electricity generated is transmitted over pole lines consisting of poles and copper wires, with telephone lines used in the operation of the plant. The transmission line consists of two parallel pole lines, each pole line supporting one 60,000 volt 3-phase circuit, and one wholly metallic telephone circuit. The length of each pole line from the power-house to the city of Los Angeles is 127 miles, and the cost of transmission lines and telephones was \$1,064,000, making the total cost of said canal, electric generating plant and transmission line \$3,001,000.

That the definite location for said right of way for said pole lines was approved by the Secretary of the Interior on or about the 28th day of December, 1904. And the application for the final location of said power-house site was approved by the Secretary of the Department of the Interior on or about the 19th day of September,

1903. That the operation and use of said canal, generating plant and transmission line for the generation and transmission of power in and from said hydro-electric generating plant to the City of Los Angeles was commenced on or about the (5th day of April, 1904), and has been so operated continuously until the present time,

34 with the exception of brief periods of stoppage for necessary repairs. That this defendant, on the aforesaid 5th day of April, 1904, being, and for a long time prior thereto having been, by itself and predecessors in interest, the owner of the right to divert and use from the waters of the Kern River in said Kern County, California, 40,000 miner's inches of water under a four-inch pressure (each miner's inch being the equivalent of 1/50 of a cubic foot per second), diverted into its aforesaid canal, to its capacity of approximately 30,000 miner's inches of said amount of water, and conveyed the same through said canal to the power-house for the generation of electric power as aforesaid, and there used said water for the generation of electric power, and has diverted and used said amount of water, subject to seasonal variation in quantity, ever since, excepting when the said water was turned out of the canal temporarily during short periods, for necessary repairs to the said canal or electric generating machinery in the said power-house.

#### V-A.

In the construction of said canal it became necessary, owing to topographical features and difficulties on the ground, to deviate at certain places from the line of the canal right of way as shown on the maps approved April 14th, 1899, and an amended application was made to the Commissioner of the General Land Office for a right of way to cover the aforesaid deviations, under the Act of March 3d, 1891, and May 11th, 1898, and an amended map was made

35 to cover the deviations, and an application accompanying said map for a line of right of way to conform to the deviation so made was transmitted to the Department of the Interior. This application was acknowledged by the acting Commissioner of the General Land Office, J. H. Fimple, by letter dated July 29th, 1905, addressed to the Register and Receiver at Visalia, California, a copy of which letter is hereinafter set forth as a part hereof, and marked Exhibit "D."

In this letter the acting Secretary said:

"The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the Act of March 3d, 1891, under which it is filed, but should be filed under the Act of February 15th, 1901, which grants permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D. 452, Denver, N. & P. Ry. Co. v. Hydro-Electric Power Co."

With this letter the amended map was returned for certain corrections, and after the corrections were made, the maps were again

sent to the Register at the Land Office at Visalia, and were by him transmitted to the General Land Office on July 5th, 1905. The acting Secretary of the Interior, by letter under date of October 4th, 1905, returned the map to the Commissioner of the General Land Office without approval, for want of the certificate of the president of the Kern River Company to the map, showing that the survey was adopted by the company as the amended definite location of the canal, and not as the definite location. Thereafter the required certificate was furnished, a copy of which is hereinafter set forth as a part hereof, marked Exhibit "E." This amended map was thereafter submitted to the Secretary of the Interior for his approval, and after full discussion with and consideration by the Department of the question respecting the use of the right of way of the canal for uses other than irrigation, the Secretary of the Interior, on November 27th, 1905, approved, subject to all valid, existing rights, the aforesaid amended map of the right of way for said canal.

#### VI.

That the Kern River Company, upon the definite location of its canal as aforesaid, conveyed by deed to the United States Government, those portions of the right of way previously granted on April 14th, 1899, and not required or used, which said conveyance was accepted.

#### VII.

That on December 28th, 1904, the Secretary of the Department of the Interior addressed a letter, relative to the right of way for the electrical transmission lines to the commissioner of the United States Land Office, which letter is set forth hereinafter as a part hereof, and marked Exhibit "F."

That on October 4th, 1910, the United States Department of Agriculture, by the Secretary of said department, issued to this defendant, a permit to use and occupy in the Sequoia National Forest, the aforesaid electrical power transmission lines, and power-house site, which permit is hereinafter set forth as a part hereof and marked Exhibit "G." That this permit superseded a former permit dated July 9th, 1907, granted by said Department of Agriculture, which said former permit superseded a permit theretofore granted by the Department of the Interior for electric transmission lines and power-house site.

#### VIII.

That the aforesaid grant of said right of way for defendant's canal was not obtained by defendant from the plaintiff or the Department of the Interior by any fraud or misrepresentation; and that the Secretary of the Interior did not, in approving the grant of said right of way for said canal, do so through any mistake, or error, or inadvertence.

This defendant avers that the application for rights of way for said canal and said electrical transmission lines were applied for at the same time as shown by the aforesaid Exhibits "A" and "B", and that it was then the intention and purpose of this defendant to use the water to be conveyed in said canal for irrigation and for the generation of electrical power. That it entertained such intention and purpose until on or about the 23d day of December, 1904, when, to end and compromise certain pending litigation, it entered into the aforesaid compromise agreement between Miller & Lux et al. and the Kern River Company, referred to in paragraph XI of plaintiff's said amended complaint.

And for a separate and third defense, defendant avers:

38

## I.

That it does not appear from plaintiff's said amended bill that there is any legislative provision or law of the United States in force to authorize the institution or prosecution of the above-entitled suit.

## II.

That it appears in and by plaintiff's said amended bill of complaint that more than six years elapsed from the 14th day of April, 1899, the date of the first approval of the said grant of right of way for said canal; and also from the 27th day of November, 1905, the date of the amended grant of the right of way for the canal described in said amended bill, before this suit was brought or filed, on, to wit, September 11th, 1914; and that said suit is and was, prior to the commencement thereof, barred by the provisions of Section 8 of said Act of March 3d, 1891.

## III.

That the plaintiff and its aforesaid Interior Department and its aforesaid Agriculture Department have had, at all times since the aforesaid grants of right of way for the said canal was made as hereinbefore stated, full knowledge of the purpose to use, and of the use by this defendant of, the said canal, electrical generating powerhouse generating electric energy, and transmission lines for the generation and transmission of electric energy from said powerhouse to the city of Los Angeles and vicinity for distribution to its various customers in and about the said city of Los Angeles in the State of California, and that having such full knowledge of this defendant's acts and the use of said property, plaintiff, nor

39 either of its said departments, has, at no time prior to the filing of the original complaint herein on the 11th day of September, 1914, threatened or brought suit against this defendant on account of the use of the said electrical generating property, except as stated in paragraph XIX of plaintiff's said amended complaint; but on the contrary plaintiff and its several aforesaid depart-

ments have, with full knowledge, acquiesced in and permitted, and failed to object to the continuous use by defendant of the aforesaid hydro-electric generating property, and plaintiff is guilty of laches of a duration of nine or more years prior to the filing of its said original bill of complaint herein, on, to wit, the 11th day of September, 1914.

Wherefore, this defendant prays to be hence dismissed with its reasonable costs and charges in its behalf most wrongfully sustained.

KERN RIVER COMPANY,

By G. C. WARD,  
*President.*

[SEAL.]

Attest:

O. V. SHOWERS,  
*Secretary.*

GIBSON, DUNN & CRUTCHER,  
*Solicitors for Defendant.*

40 EXHIBIT "A" TO ANSWER.

*Letter, September 24, 1897, Kern River Co. to Commissioner,  
General Land Office.*

(Ante, Page 8.)

September 24, 1897.

Commissioner General Land Office,  
Washington, D. C.

DEAR SIR:

The Kern River Co.—a corporation, organized for the purpose of irrigation and the generation and electrical transmission of power—is preparing to file, in your office, an application for right of way over the Sierra Forest Reservation, for a canal, reservoir site and transmission line.

This application is being framed in accordance with circular of instructions, issued by the General Land Office, and approved February 20th, 1894, entitled "Regulations Concerning Right of Way for Canals, Ditches, and Reservoirs over Public Lands and Reservations for the purpose of Irrigation."

These instructions require the filing (see Par. 5, pg. 9) of certain maps (in duplicate) and certain papers (showing the regularity of the company's organization and procedure) with the Register of the land district in which the location is to be made.

These maps are to be filed in duplicate with the local land office, in order that the local office may keep one, and send the other, with the papers before mentioned, to the General Land Office.

41 In the case of the Kern River Co. the lines lie partly in the Independence, and partly in the Visalia Districts. This is a case not provided for in the circular of instructions, and we will be obliged if you will furnish us with further instructions in the matter.

A full compliance with the circular of instructions would require the filing, in each office, of duplicate maps showing only so much of the system as lay in that district; and also a set of papers in each office. By doing this you would receive two incomplete maps and one superfluous set of papers.

We are of the opinion that it would better serve the purposes of simplicity and convenience in your office, and lessen the expense and delay to this company, were we to file duplicate maps of our whole system, and the required papers, in only one office (say the Visalia) and let them be forwarded, thus complete in one set, from there to your office; and then file a single map in the other local office (say the Independence) showing the part of the system lying in that district; for the local use and information of that office.

If you will kindly send us your instructions in this matter we will be greatly obliged.

Yours very truly,

(Signed)

KERN RIVER COMPANY,  
By CHAS. FORMAN,  
*President.*

42

## EXHIBIT "B" TO ANSWER.

*Letter, November 12, 1897, Kern River Co. to Herman.*

(Ante, page 8.)

November 12, 1897.

Honorable Binger Herman,  
Commissioner General Land Office,  
Washington, D. C.

DEAR SIR:

The Kern River Company, a corporation duly incorporated for the purposes of irrigation, and the generation and distribution of electric power, hereby makes application to the Commissioner of the General Land Office and to the Secretary of the Interior for rights of way as follows:

(1). Right of way for a reservoir as particularly described in a map marked Exhibit "A."

(2). Right of way for a diversion canal for the purpose of concentrating drainage from watersheds, as particularly described in a map marked Exhibit "B."

(3). Permission to construct a trail for the purpose of transporting materials, as particularly described in a map marked Exhibit "B."

(4). Right of way for a canal as particularly described in a map marked Exhibit "C," "D."

(5). Right of way for two lines of poles to carry wires for the transmission of electric power, as particularly described in a map marked Exhibit "E."



43 All of the said works lie within the boundaries of the Sierra Forest Reservation, in the State of California; and are particularly described in the maps and papers which are forwarded today to the United States Land Offices at Independence and at Visalia, in compliance with the requirements set forth in the published instructions and regulations of your Department, concerning such applications.

This application is made in order that the Kern River Company, a corporation organized for the purposes of irrigation and the generation and distribution of electric power, may obtain the benefits afforded under an act of Congress approved March 3d, 1891, granting right of way for canals, ditches and reservoirs through the public lands of the United States; and under an amendment to said act, approved May 14th, 1896, entitled "An Act to amend an act approved March 3d, 1891; granting the right of way upon the public lands for reservoir and canal purposes."

The maps and papers which accompany this application have been prepared and filed in accordance with the instructions contained in the pamphlets of regulations issued from your Department and approved February 20, 1894 and December 23, 1896.

44 As the instructions do not specify the manner or place of filing this application and for the sake of convenience to the Honorable Commissioner, a duplicate of it will also be found to accompany the various papers required to be filed in making this application; and which have been forwarded to the United States Land Office at Independence, California.

Very respectfully.

(Signed)

KERN RIVER COMPANY,  
By CHAS. FORMAN,  
*President.*

Attest:

H. S. McKEE,  
*Secretary.*



## EXHIBIT "C" TO ANSWER.

*Letter, April 15, 1898, Herman to Register and Receiver, Visalia, Cal.*

(Ante, page 9.)

1897—116,675.

Department of the Interior.

General Land Office.

Washington, D. C.

April 15, 1898.

Register & Receiver,  
Visalia, California.

SIRS:

With his letter of Dec. 16, 1897, the register transmitted two maps, not in duplicate, filed by the Kern River Company as part of its application for permission to use right of way over public lands for canal and pole lines; and for necessary grounds for power plant, for the purpose of generating and distributing electric power. Both maps were filed as stated in order to obtain the benefits of Secs. 18 to 21, act of March 3, 1891 (26 Stat., 1905), and the act of May 14, 1896 (29 Stat., 120).

Map No. 1, (marked Exhibit "E") shows the survey line of right of way for two lines of poles each covering ground to the  
45 width of 25 feet and extending side by side their entire length from a point in the S. W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  Sec. 10, T. 27 S., R. 32 E., to the S. E. corner Sec. 34, T. 28 S., R. 32 E.

Map No. 2 (marked Exhibit- C & D) shows a canal line from a point in the S. E.  $\frac{1}{4}$  Sec. 33, T. 25 S., R. 33 E., to a point in S. W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$ , Sec. 10, T. 27 S., R. 32 E., a distance of 12.43 miles. Also 20 acres for power plant covering the E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$ , Sec. 10, T. 27 S., R. 32 E.

The Department has held that "The two acts of March 3, 1891, and May 14, 1896, are so different in the character of estates or permission therein provided for, as well as in the uses to which the right of way may be devoted and the extent of such right of way, that no permission or grant can be sanctioned which is based on the two acts" (H. W. O'Melveny, 24 L. D., 560).

The act of May 14, 1896, authorized the granting of permission to use right of way to the extent of twenty-five feet. The present application is for a canal from 35 to 45 feet in width, and for two pole lines each 25 feet in width adjoining each other throughout their entire length of about 12 miles making practically a single right of way twice the width allowed by law. The canal map is drawn on a scale of 500 feet to an inch.

The company claims that a larger scale than 2,000 feet to an inch, as required by the regulations, is necessary to properly show the proposed works. The present map is too large for convenient examination and filing; and if the field-notes were furnished separately typewritten with clear carbon copy preferred, with only the numbers of the station or courses written along the line of survey, it would seem that a map thus drawn on the required scale, would be sufficiently large.

Map No. 2, includes grounds for power plant. Additional evidence should be furnished showing specifically that the tract is required to its full extent and for what purposes and its location and extent should be described in forms 3 & 4 as required by par. 5, Cir. Dec. 23, 1896, (23 L. D., 519). In said forms reference is made to "spill way and other requisite accessories," as nothing of the kind is shown on the map such references should be omitted.

The canal line is partly in the Visalia and partly in the Independence land districts. Duplicate map and field-notes should be filed in one office and a single set in the other (par. 2, Cir. Dec. 23, 1896). Map No. 1, and field-notes fail to show connection with nearest existing corners of public survey at the intersection of the line of survey with section lines north of section 34, T. 27 S., R. 32 E.

The land involved is all within the Sierra Forest Reserve; it would be necessary, therefore, before any of the maps could be approved, for the company to file an agreement stipulating not to take any timber from the lands within the reserve, outside of the proposed right of way (Hamilton Irrigation Co., 21 L. D. 330).

In accordance with Department circular of March 21, 1898, amending Sec. 11 of the rules and regulations governing Forest

Reservations the applicant will be required to give bond in a satisfactory surety company to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating "that the makers thereof will pay the United States for any and all damage to the public lands, timber, natural curiosities or other public property on such reservation or upon lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur."

In view of the foregoing this office must refuse to submit maps for approval in their present form.

You will send the enclosed copy of this letter to the company and allow it sixty days in which to file new maps in accordance with the above suggestion, or appeal.

Very respectfully,

(Signed)

BINGER HERMANN,

*Commissioner.*

## EXHIBIT "D" TO ANSWER.

*Letter, July 29, 1905, Acting Commissioner to Register and Receiver, Visalia, Cal.*

(Ante, Page 12.)

"F."

C. C. K.

1905—16,718—26,705—69,710.

Department of the Interior,

General Land Office.

Washington, D. C., July 29, 1905.

Register and Receiver,  
Visalia, California.

SIRS:

By letter of January 19, 1905, you transmitted map and field-notes, in duplicate, together with other papers filed by the Kern River Company under the act of March 3, 1891, (26 Stat., 1095), showing the amended survey of the amended definite location of its canal from a point in Sec. 33, T. 25 S., R. 33 E., M. D. M., on the Kern River to a point in Sec. 10, T. 27 S., R. 32 E., M. D. M., a distance of 63,019.7 feet. And by letters of Feb. 4, 1905, and April 20, 1905, the register of the Independence, California, land district transmitted triplicate copy of said map, and stipulations and bond in the sum of \$1,500. The application has been examined with the following results.

This map is filed by the company as an application showing the amended survey of the amended definite location of its canal shown on its map filed June 3, 1898, under the act of March 3, 1891 (26 Stat. 1095), which was approved by the Secretary of Interior on April 14, 1899.

The new map filed shows the deviation of the amended survey from that of the survey shown on the approved map, and the company has filed a relinquishment, under seal, of all rights acquired under the former approval as to the portions amended, but the company has failed to place on the map forms 3 and 4 found on pages 21 and 22, circular of June 26, 1902, which, to conform to the facts of this application, need be changed only in describing the line of survey as the "amended survey" and the "amended definite location" of the canal. See paragraph 26, circular June 26, 1902.

The company has placed on the map forms 5 and 6, found on page 22 of the circular, which, if the canal as shown by the amended survey on the map has been constructed, should remain, but if the canal has not been constructed as shown by the amended survey, they should not appear thereon.

The company has failed to furnish the data required by the 7th,

9th and 11th subdivisions of paragraph 5, circular of June 26, 1902, which must be furnished.

The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the act of March 3, 1891 (26 Stats., 1095), under which it is filed, but should be filed under the act of Feb. 15, 1901, (31 Stat., 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D., 452, *Denver, Northwestern & Pacific Ry. Co. vs. Hydro-Electric Power Co.*

The bond is not acceptable for the reason that only the date of the filing of the triplicate copy of the map in the Independence land district is given, when the filing of the map in duplicate in the Visalia land district and the date thereof should also be stated in the proper blank space in the bond. As no changes or erasures can be made after the bond has been executed, a new bond must be furnished, a blank form of which is herewith enclosed, and attention is called to the printed instructions on the back thereof.

The map in triplicate is herewith returned, which, together with the blank form of bond and enclosed copy of this letter, you will forward to the company, who will be allowed a reasonable time within which to comply with the foregoing requirements.

As the triplicate copy of the map has been filed in the Independence land district office, it need not be refiled in that office, but all the maps and papers, in order that they may be kept together, may be refiled in your office.

Very respectfully,

(Signed)

J. H. FIMPLE,  
*Acting Commissioner.*

#### EXHIBIT "E" TO ANSWER.

*Application of President of Kern River Co. for Right of Way, etc.*

(Ante, Page 12.)

#### Applicant's Certificate.

I, Chas. Forman, do hereby certify that I am president of the Kern River Company, a corporation organized and existing under the laws of the State of Maine, that is applicant for the Right of Way for canal described on this map. That H. Hawgood who subscribed the accompanying affidavit, is the chief engineer of the said company; that the survey of the canal, as accurately represented on this map and by the accompanying field-notes, was made under the authority of the company; that the said canal as represented on this map and said field-notes, was adopted by the company, by resolution of its board of directors on the 20th day of October, 1897, as the definite location of said canal, described as follows: the initial point

of said survey being N. 28° 09' E. 2762 feet distant from the  $\frac{1}{4}$  Sec. corner between Secs. 33 & 4 Townships 25 & 26 south, range 33 east

51 M. D. M. The length of said canal being 66,400 feet and the terminal point thereof being N. 81° 12' W. 1691 feet distant from the S. E. corner of Sec. 10, township 27 south, range 32 east M. D. M. and that no lake or lake-bed, stream or stream-bed, is used for the said canal except as shown on this map; and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the company may obtain the benefits of sections 18 to 21 inclusive of the act of Congress approved March 3, 1891, entitled "An act to repeal timber culture and for other purposes," and of section 2 of an act of Congress approved May 11, 1898, entitled "An act to amend an act to permit the use of the right of way through public lands for tram roads, canals and reservoirs and for other purposes," enlarging the purposes for which right of way granted under said sections 18 to 21 of the act of March 3, 1891, may be used. And I further certify that the right of way for said canal is desired solely for the purposes prescribed by the afore-said acts.

[Corporate Seal.]

CHAS. FORMAN,  
*President of the Kern River Company.*

Attest:

H. S. McKEE,  
*Secretary.*

52

## EXHIBIT "F" TO ANSWER.

*Letter, December 28, 1904, Hitchcock to Commissioner of General Land Office.*

(Ante, Page 13.)

Department of the Interior,  
Washington, D. C., December 28, 1904.

The Commissioner of the General Land Office.

SIR:

Under cover of a letter of the 19th instant to the Department, you submitted, with related papers, four maps, filed by the Kern River Company under the act of February 15, 1901, showing the amended definite location of its line for the purpose of transmitting and distributing electrical energy.

The several sections of line covered by the maps cover a distance of 29.26 miles within the Visalia, Independence and Los Angeles land districts, California, the line shown on Map 4, being within the limits of the Pine Mountain and Zaca Lake Forest Reserve.

The Acting Director of the Geological Survey has informed you that approval will not interfere with any project now under contemplation by the Reclamation Service and the forestry officers have reported favorably in the premises.

The Company has supplied the stipulations required by the regulations under the Act as well as bond in the sum of \$3,000.00 which you have approved and you have reported that the papers and maps conform to the regulations and the township plats.

Among the papers is a formal relinquishment by the company of the permission for the use of right of way which it secured from the Department on July 9, 1903, and shown on four maps on which Departmental certificates were endorsed, so far as the right of way shown on such maps is not included within the right of way shown on the maps now before me.

In view of the foregoing and in accordance with your recommendation I hereby accept the relinquishment filed by the company and have granted permission to use the right of way shown on the maps by my endorsement thereon to that effect.

The enclosures in your letter are returned herewith.

Very respectfully,  
(Signed)

E. A. HITCHCOCK,  
*Secretary.*

EXHIBIT "G" TO ANSWER.

*Transmission Line Permit, Issued by Secretary of Agriculture,  
Dated October 4, 1910.*

(Ante, Page 13.)

A true and attested copy.  
(Signed)

H. S. GRAVES,  
*Forester.*  
F. L.

United States Department of Agriculture.

Forest Service.

Sequoia National Forest, Uses  
Kern River Company, Power,  
Power House and Transmission Line.

March 19, 1904.

*Transmission Line Permit.*

Permission is hereby granted to the Kern River Company, a corporation organized and existing under the laws of the State of Maine, and having an office and principal place of business at Los Angeles, California, to maintain an electric power transmission line over approximately 32 miles within the boundaries of the Sequoia National Forest, California, and to occupy approximately 40 acres of land as a powerhouse site, said power house site being described as the W./2 S. E./4 S. E./4, and the E./2 S. W./4 S. E./4,

Sec. 10, T. 27 S., R. 32 E., M. D. M., and the said transmission line extending from the said power house site in a general southerly and southeasterly direction to a point on the south boundary line of the said National Forest on the south line of Sec. 36 T. 31 S.

55 R. 33 E., M. D. M. The power house site and a part of the transmission line being as shown on a certain "map showing amended definite location of Kern River Company's transmission line" filed with and made a part of that certain "Special Use Agreement" signed in duplicate by the Kern River Company on the 9th day of July, 1907, and approved by Acting Forester James B. Adams, August 24, 1907, that portion of the transmission line not shown on the above mentioned tracing being as shown on certain maps designated as "Map No. 1" and "Map No. 2" filed in the United States Land Office at Los Angeles, California, June 29, 1904, blue-prints of the said map No. 1 and the said Map No. 2 being on file in the Forest Service, the said power house site and transmission line to be used for and in connection with the generation and conveying of electric power for commercial uses, the permission herein granted being subject to compliance by the Kern River Company (hereinafter called the permittee) with the following special conditions:

1. The Permittee shall pay to the First National Bank of San Francisco, California (United States Depository), or such other depository or officer as shall hereafter be duly designated by the United States, to be placed to the credit of the United States the sum of \$200 annually in advance from July 1, 1910, credit to be given on the first annual payment for the sum of \$50, being one-half the amount stipulated in the above mentioned "Special Use Agreement" as annual rental from January 1 of each year, provided the payment due on January 1, 1910, has been made by the Permittee,

56 the said "Special Use Agreement" being superseded by this permit.

2. The Permittee shall clear the land along the transmission line and around the power house and appurtenant buildings for such width and in such manner as the Forest officers may direct, payment for any merchantable timber cut or destroyed by the Permittee to be made to the United States Depository, as above set forth, at such rates and at such times as may be fixed and specified by the Forest Supervisor, such rates to correspond with the prevailing stumpage rates in the said National Forest for like material, at the time the timber is cut, injured, or destroyed.

3. The Permittee shall protect all Forest Service and commercial telephone lines at crossings and at all places of proximity to the transmission line, in the standard manner and satisfactorily to the Forest Officers and shall maintain the line in such manner as not to injure stock grazing in the Forest.

4. The Permittee shall sell electric power to the United States when requested at as low a rate as is given to any other purchaser for a like use at the same time.



5. This permit is subject to all valid claims.

6. The Permittee and its employees shall do all in their power both independently and upon the request of Forest officers to prevent and suppress Forest fires.

7. The Permittee shall dispose of all brush and other refuse resulting from the unnecessary clearing or cutting of timber on the lands occupied under this permit at such time and in such manner as shall be directed by the Forest officers.

8. No person undergoing a sentence of imprisonment at hard labor imposed by any court of the several States, Territories, or municipalities having criminal jurisdiction, shall be employed in the performance of this contract. (Executive Order, May 18, 1905.)

9. No member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified and during his continuance in office, and no officer, agent or employee of the Government, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or Company. (Sec. 3741 R. S. and Secs. 114-116 Act of March 4, 1909).

Dated at Washington, D. C., this 4th day of October, 1910.

(Signed)

JAMES WILSON,  
*Secretary of Agriculture.*

That thereafter and on November 19, 1918, said cause came on regularly for trial before said Court, sitting at Los Angeles, California, and at said trial the following evidence was introduced and proceedings had, to wit:

It was stipulated in open court by counsel for the respective parties and said stipulation was duly and regularly filed in the words and figures as follows:

(Title of Court and Cause.)

*Stipulation of Agreed Facts.*

In the above-entitled cause, in order to facilitate the trial thereof, It is hereby stipulated, by and between the respective parties thereto, that the following facts shall be received and considered upon the trial of said cause, as evidence, subject to all legal objections as to materiality or competency thereof made upon the trial:

# I.

The Government in this case is seeking to enjoin the Kern River Company from using, for the development of electrical power, a



right of way for a canal on Government land within the boundary of the Sequoia National Forest, acquired under the Act of March 3d, 1891, and the Act of May 11th 1898, and to cancel the grant made, and to require the Company to secure a permit from the Secretary of Agriculture in accordance with the provisions of the Act of February 15th, 1901. (31 Stat. 790.)

## II.

The Kern River and Los Angeles Electric Power Company was organized and incorporated May 18th, 1895, under the laws of the State of Arizona. Its President was Charles Forman; its Secretary, H. S. McKee; and its Engineer H. Hawgood. The object of the project was as follows:

"The intent and object of the enterprise is to use the flow of the north fork of Kern River for the generation of electrical energy, and to convey and sell the same to various consumers as far as Los Angeles. It is probable that eighty per cent of the total power generated would go to that city. The remaining twenty per cent being disposed of to the mining, milling and agricultural interests embraced in the first seventy miles of the line. (Company's Prospectus, p. 11, Exhibit 1.)"

## III.

This company was succeeded by the Kern River Company, a corporation organized and existing under the laws of the State of Maine, June 28th, 1897, with the same officers. The purpose was to develop the same projects. The water rights in Kern River purchased by the first named company were deeded to the Kern River Company on July 17, 1897. These water rights were the following (Exhibit 2):

Oct. 18, 1894,	J. W. Eddy .....	25,000 in.
April 24, 1895,	J. W. Eddy .....	35,000 "
Dec. 23, 1894,	E. H. Gale .....	35,000 "
June 19, 1895,	Kern River & L. A. Elec. Power Co. . .	35,000 "
June 20, 1895,	Kern River & L. A. Elec. Power Co. . .	35,000 "
July 2, 1895,	Kern River & L. A. Elec. Power Co. . .	5,000 "

The company also acquired the following water appropriations (Exhibit 3):

Sept. 22, 1897,	Kern River Company .....	800 Sec. ft.
Nov. 4, 1897,	Kern River Company .....	800 " "
Sept. 28, 1897,	Kern River Company .....	100 " "
June 19, 1899,	Kern River Company .....	40,000 in.
June 19, 1899,	Kern River Company .....	40,000 "

60

Dec. 19, 1901,	Wm. G. Kerkehoff .....	5,000 "
Dec. 15, 1901,	Wm. G. Kerkehoff .....	10,000 "

Feb.	12, 1902,	Wm. G. Kerkehoff .....	5,000	"
Mar.	8, 1902,	G. O. Newman .....	30,000	"
Mar.	9, 1902,	G. O. Newman .....	30,000	"
Mar.	15, 1902,	G. O. Newman .....	30,000	"
Mar.	15, 1902,	T. M. Shaw .....	30,000	"
June	15, 1903,	Kern River Company .....	5,000	"
July	1, 1905,	H. S. Fisher .....	1,000	"
July	1, 1905,	H. S. Fisher .....	1,000	"

## IV.

The Kern River Company on June 3d, 1898, filed a map of a right of way for its proposed canal under Secs. 18 to 21 of the Act of March 3, 1891 (26 Stats. 1095), and Sec. 2 of the Act of May 11, 1898 (30 Stats. 404), in the Land Office at Independence, California. This map was refiled on November 3, 1898 (Exhibit 4). The Secretary of the Interior on April 14, 1899, approved this right of way subject to all valid existing rights.

## V.

The plans of the Kern River and Los Angeles Electric Power Company and the Kern River Co. contemplated the construction of a diversion dam and canal to take temporarily from Kern River a large volume of water for the development of power, the water to be returned to the river below the outlet of the canal.

## VI.

Construction of the canal began on July 31, 1902, which construction conformed to the right of way shown on Exhibit 4, except for certain deviations which were later shown on an amended map. Operation of the power plant began December 31, 1904.

## VII.

April 17th, 1903, a suit, (No. 4470) was filed in the Superior Court of Kern County by Miller and Lux et al., against the Kern River Company, et al., to restrain the defendants from diverting water from the Kern River. This suit was later transferred to the Federal Court, Southern District of California, and was numbered 56 Equity. On March 24, 1904, another suit (No. 4739) was filed in the Superior Court of Kern County by Miller and Lux Co. vs. A. Brown Co., Kern River Co., et al. A final decree was entered in the State Court (Exhibit 5). As a result of these suits, on December 23, 1904, the Kern River Company, through its President, entered into an agreement with Miller and Lux, et al., in which the Company agreed that all water diverted by it in said canal should be used solely for the purpose of generating power and for no other purpose. This agreement was incorporated in the final decree in suit No. 4739. A copy of this contract is hereto attached and marked Exhibit 6.

## VIII.

On January 19, 1905, the Kern River Company filed a map of amended definite location of the right of way for canal under the Acts of March 3, 1891, and May 11, 1898. This map was refiled September 2, 1905 (Exhibit 7). The Secretary of the Interior on November 27, 1905, approved this amended right of way upon relinquishment by the company of those portions of the grant  
62 of April 14, 1899, not used, subject to all valid existing rights.

The Government land involved is described in paragraphs VI and XIV of the bill.

## IX.

The right of way, as shown by these two maps of location, for a canal has been used since the time the power plant went into operation December 31st, 1904, for the development of electrical power for sale. Prior to this time no use was made of the canal, except construction work thereon.

## X.

On March 12, 1908, the Secretary of Agriculture reported to the Secretary of the Interior that the Kern River Company was using its right of way for power purposes instead of irrigation (Exhibit 8). September 27, 1908, the Secretary of the Interior, through the Register and Receiver of the Independence Land Office, served notice on the Kern River Company to show cause within 90 days why suit should not be instituted to cancel said grants. Thereafter the Kern River Company, in response to the notice to show cause, filed an answer. In a decision dated November 12, 1909, the Secretary of the Interior decided that the grant had been made for irrigation purposes and not for the development of electrical power. (Exhibit 9.) November 19, 1909, the Commissioner of the General Land Office, pursuant to instructions from the Secretary of the Interior, gave the company 60 days' notice to amend the application filed June 19, 1905, to bring it within the Act of February 15, 1901 (31  
63 Stats. 790) (Exhibit 10). The company refused to do this and suit was filed in September, 1914.

## XI.

January 18, 1899, the Secretary of the Interior approved a map for power-house and transmission line under the Act of May 14, 1896 (Exhibit 11).

## XII.

December 28, 1904, the company relinquished the right of way previously approved July 9, 1903 (Exhibit 12).

## XIII.

The Secretary approved four maps for the extension of this transmission line under the Act of February 15, 1901. The Secretary of Agriculture on October 4, 1910, issued a permit, superseding one of July 9, 1907, for a power-house site and transmission line leading from this site.

## XIV.

Kern River Company also filed November 3, 1898, a map for right of way under the Act of March 3, 1891, relating to a reservoir and ditch in Twps. 23 and 24 S., R. 34 E., M. D. M. (Exhibit 13). This map was approved by the Secretary of the Interior January 18, 1899. The project was not constructed and the company relinquished the right of way on April 21, 1910.

## XV.

The Kern River Company on September 24, 1897, wrote a letter to the Commissioner of the General Land Office, concerning a canal and transmission line (Defendant's Exhibit "A"). Later, on November 12, 1897, the Kern River Company made an application for a right of way for a reservoir, diversion canal, construction trail, canal and two electrical transmission lines.

## XVI.

On July 29th, 1905, the Commissioner of the General Land Office addressed a letter to the Register and Receiver at Visalia (Exhibit 14):

"The company's attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only, the application cannot be granted under the act of March 3, 1891 (26 Stats. 1095) under which it is filed, but should be filed under the act of Feb. 15, 1901 (31 Stat. 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes. See 32 L. D. 452, Denver, Northwestern & Pacific Ry. Co. vs. Hydro-Electric Power Co."

This information was communicated to the Kern River Company.

## XVII.

The facts set forth in paragraph I of the second amended bill are true.

## XVIII.

The facts set forth in paragraph II of said bill are true.

## XIX.

The facts set forth in paragraph III of said bill are true.

65

## XX.

The facts set forth in paragraph IV of said bill are true.

## XXI.

It is stipulated that the facts set forth in paragraph VI of said bill are true, as to the ownership by plaintiff of said land therein described, prior to the granting thereof of the right of way for defendant's canal. This is, however, not to be construed as a stipulation negating the right of way of defendant's canal therein, or dealing with this latter question in any manner.

## XXII.

The facts set forth in paragraph VIII of plaintiff's amended bill are true.

## XXIII.

The facts set forth in paragraph IX of said bill are true.

## XXIV.

The facts set forth in paragraph X of said bill are true.

## XXV.

The facts set forth in paragraph XIII of said bill are true.

## XXVI.

The facts set forth in paragraph XIV of said bill are true, but this shall not be construed as a stipulation that defendant did or did not obtain a right of way through said land therein described. It is further stipulated that said land described in said paragraph

66 XIV was also open and subject to the provisions of Section 2 of the Act of Congress approved May 11, 1898, entitled: "An Act to amend an Act to permit the use of a right of way through public lands for tramroads, canals and reservoirs, and for other purposes."

It is further stipulated that defendant has never used said canal for the purpose of irrigation, but has ever used, and now uses, the same solely for the purpose of carrying water to be used to generate electric power, which the said company sells mainly for the purpose of furnishing motor power to certain electric railway systems in and around certain municipalities in said southern division of the south-

ern district of the State of California, and for supplying light for different municipalities throughout said southern district of California and that a part of the electricity generated by the said company is being sold by the said company to farmers and ranchers along the line of the electric power distributing system of said defendant, which said power is used for the purpose of pumping water to be, and which is, used for irrigating land.

It is further stipulated that the amount and percentage of said electrical power used for pumping water for irrigation purposes may be shown at the trial by either party.

## XXVII.

That the facts set forth in paragraph XIX of plaintiff's amended bill are true.

## XXVIII.

It is further stipulated and agreed that the exhibits set forth in defendant's answer to plaintiff's second amended bill, lettered respectively "A," "B," "C," "D," "E," "F" and "G," are  
67 what they purport to be, and true copies of genuine letters and documents signed or issued by the parties purporting to sign or issue said letters or documents, but that if on comparison with the said originals any error or errors are discovered either party has the right hereunder to insist on said errors being corrected.

## XXIX.

It is further stipulated that the facts set forth in paragraph V of the separate and second defense of the answer of defendant, of its answer herein, are true.

## XXX.

It is further stipulated that the facts set forth in paragraph V-a of the said second defense of defendant's answer, are true with the exception of the statement reading as follows: "after full consideration by the Department of the question respecting the use of the right of way of the canal for uses other than irrigation," but that as to the truth of this latter allegation quoted from said paragraph, no stipulation is intended to be made, said question being reserved to both parties and to inferences and conclusions from other facts admitted.

## XXXI.

That the facts set forth in paragraph VI, of second defense, of defendant's answer to the second amended bill are true.

## XXXII.

That the facts set forth in paragraph VIII, of second defense, of defendant's said answer shall be dealt with at the trial as follows:

68 As to the first clause of said paragraph, it shall depend on inferences to be drawn from the facts in the cause; and as to the second clause of said paragraph VIII, defendant may introduce at the trial evidence to prove the intent alleged in said second clause of said paragraph.

## XXXIII.

The Kern River Company has been succeeded by the Pacific Light & Power Company, and this latter company has been succeeded by the Southern California Edison Company. Any decree rendered in this case shall be binding upon the Pacific Light & Power Company and the Southern California Edison Company as to the property in this cause involved.

## XXXIV.

That said cause may be set for trial at the early convenience of Court and counsel; and that the briefs heretofore filed herein may be considered by the Court on the final submission of said cause for decision.

## XXXV.

That copies of the documents and maps herein referred to may be used instead of the originals or certified copies thereof, but each and all subject to any necessary corrections by the originals or duly certified copies.

ROBERT O'CONNER,

*United States Attorney.*

H. P. DECHANT,

*Assistant to the Solicitor,  
Department of Agriculture.*

GIBSON, DUNN & CRUTCHER,

*Solicitors for Defendant.*

69 Dated: September 19, 1918.

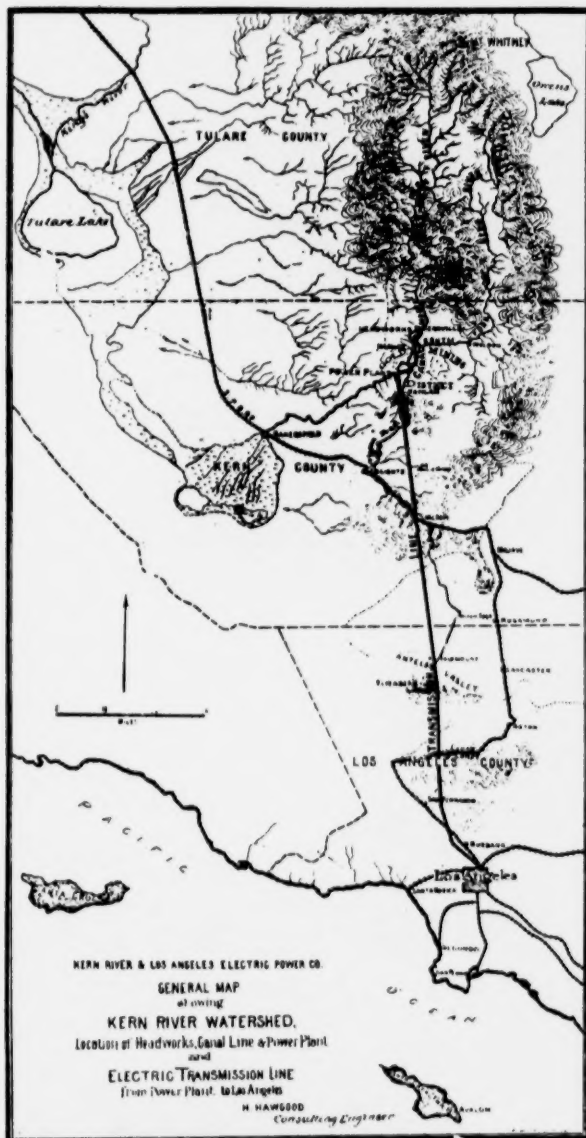
In connection with said stipulation the following exhibits were filed:

*Representative Examples of Water Appropriation Notices from  
Exhibit 2.*

STATE OF CALIFORNIA,  
*County of Kern, ss:*

All persons are hereby notified that I have located, and that I claim Twenty-five thousand miner's inches of water (Seven hundred





Kern River Co. }  
 v. }  
 W. Slater } 11/15/90



cubic feet per second), unappropriated and flowing in Kern River measured under four inch pressure at the point where this notice is posted, which is the point of division (see note below) the purpose for which said water is claimed is for irrigation and water power for the operation of machinery for producing electricity and for other useful purposes, at a point on the Kern River near the center of section fifteen (15) township twenty-seven (27), south of range thirty-two (32) east, Mount Diablo Meridian, and at drops in the Canal; and that I intend to divert said water by means of dams and excavations and said water will be conveyed from the point of division by means of canals, flumes, ditches, pipes, tunnels, or aqueducts at different points along the line, as the circumstances may require, sixty feet wide and five feet deep, and of sufficient size to conduct said water to the point of use.

The place where this notice is posted is on said River in section thirty-three (33), township twenty-five (25) S., range thirty-  
70 three (33) east, Mount Diablo Meridian, adjoining the town-  
site of Kernville on the east, County of Kern as aforesaid.

J. W. EDDY.

Witness-:

C. J. E. TAYLOR.  
STEPHEN BARTON.

Dated October 18th, 1894.

(NOTE.)—This diversion is from the main, into the West Channel, and the water will be further diverted from the West Channel into a canal at a point about eighty rods lower down the river.

(Here follows map marked pages 71 and 72.)

73 I hereby certify the foregoing to be a full true and correct copy of the original filed for record at the request of J. W. Eddy, October 24th, 1894 at 9:55 A. M.

T. A. WELLS,  
*Register of Deeds.*

STATE OF CALIFORNIA,  
*County of Kern, ss:*

All persons are hereby notified that I have located and that I claim Thirty-five thousand Miner's Inches of water (seven hundred cubic feet per second), unappropriated and flowing in Kern River, measured under four inch pressure, at the point where this notice is posted, which is the point of diversion. The purpose for which said water is claimed is for irrigation and water power for the operation of machinery for producing Electricity, Manufacturing, Mining, and other useful purposes, at a point in the Kern River near the mouth of Clear Creek, Section fifteen (15), township Twenty-seven (27) South, of Range thirty-two (32) east, M. D. M., and at drops on falls in the canal or race where the power can be economically and conveniently used; and that I intend to divert said water by means of dams and excavations, and said water will be conveyed from the point of diversion by means of canals, flumes, ditches, races, pipes, tunnels or aqueducts at different points along the line as the circumstances and conditions may require, Sixty feet wide and five feet deep, or of sufficient size to conduct said water to the point of use.

74 The place where this notice is posted is on the East bank of Kern River opposite the Townsite of Kernville, section thirty three (33) Township twenty-five (25) south, range thirty-three (33) East, M. D. M.

Dated December 23, 1894.

E. H. GALE.

Witness:

E. H. JONES.

*Notice of the Kern River & Los Angeles Elec. Power Co. of Appropriation of Water.*

All persons are hereby notified that the Kern River & Los Angeles Electric Power Company, a corporation organized under the laws of the Territory of Arizona, has located and hereby claims thirty-five thousand (35,000) miner's inches of water measured under four (4) inches, pressure (700 cubic feet per second) unappropriated and flowing in Kern River at the point where this notice is posted \* \* \* which is the point of intended diversion. \* \* \*

It is intended to divert this water from the main channel of Kern River into a Canal. The purposes for which said water is claimed are for irrigation and for the purpose of acquiring water power for the operation of machinery, for generating electricity — for other useful purposes. \* \* \*

The places of intended use are a point on or near the Kern

River near section thirty-three (33), township twenty-seven (27), South of range thirty-one (31), east, Mt. Diablo Meridian, and at drops in the canal. \* \* \*

The above Corporation intends to divert said water by means of dams and excavations and said water shall be conveyed from the point of intended diversion by means of canals, flumes, ditches, pipes and tunnels, and aqueducts, at different points along the line as circumstances may require, sixty (60) feet wide and five feet deep and of sufficient size to conduct said water to the point of intended use. \* \* \*

This notice is posted on Kern River near the point where said River crosses the south line of section seventeen (17), township twenty-seven (27) south of range thirty-two (32) east Mr. Diablo Meridian in the County of Kern, State of California.

Dated June 20, 1895.

THE KERN RIVER & LOS ANGELES  
ELECTRIC POWER CO.  
JOHN CROSS, *First Vice-President.*

Witness:

L. J. C. SPRUANCE,  
*Secretary.*

I hereby certify the foregoing to be a full, true and correct copy of the original filed for record at the request of Wells, Fargo & Co., June 29th, 1895, at 9:03 A. M.

F. S. BENSON,  
*Recorder.*

*Representative Examples of Water Appropriation Notices from Exhibit 3.*

### Notice of Appropriation.

Notice is hereby given that the Kern River Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, has located and appropriated and hereby claims eight hundred (800) cubic feet per second of water unappropriated and flowing in Kern River, in the County of Kern, State of California, at the point where said notice is posted, being on the East bank of said Kern river opposite the townsite of Kernville, in said county, in section thirty-three (33), township twenty-five (25) south, range thirty-three (33) east, M. D. M., which last named point is hereby designated and named as the point of intended diversion of said eight hundred (800) cubic feet per second of water;

That the purposes for which said water is appropriated are for irrigation, generation of power, and other useful and beneficial purposes; that said water hereby appropriated is to be carried and conveyed from said point of diversion for about three quarters ( $\frac{3}{4}$ ) of a mile in a canal about sixty (60) feet wide and about nine (9) feet deep; and thence for a distance of between eleven (11) and twelve

(12) miles in a canal about twenty-five (25) feet wide at the bottom, and about forty-five (45) feet wide at the top and about nine (9) feet in depth, with flumes and other necessary works, to the places of intended use, which are at this point, and at various other points of said canal where said water is to be diverted and used for purposes of irrigation and other useful purposes, and also at a point near the north line of section fifteen (15), township twenty-seven (27) south, range thirty-two (32) east, M. D. M. This notice is posted at a point on the west bank of the Kern River near Green street in the town of Kernville.

KERN RIVER COMPANY,  
By CHAS. FORMAN,  
*President.*

Attest:  
H. L. McKEE,  
*Secretary.*

77 Witnesses:  
O. G. McWAIN.  
CHAS. C. TAYLOR.

Dated this the 22d day of September, 1897.  
*Dated this the 22d day of September, 1897.*

I certify the foregoing to be a full and true copy of the original filed for record at request of Bender & Hewitt. Sep. 27th, 1897, at 10:02 A. M.

F. S. BENSON,  
*Recorder,*  
By J. W. CROSLAND,  
*Dep.*

*Notice of Appropriation.*

Notice is Hereby Given: That the undersigned, G. O. Newman, does hereby claim all the water of the Kern River flowing at this intended point of diversion to the extent of 30,000 inches, measured under a four-inch pressure; said water to be diverted at a point in southwest quarter of northeast quarter of section nineteen (19), township twenty-six (26) south, range thirty-three (33) east, M. D. M., where this is posted. That the purposes for which he claims it are as follows:

For the purpose of applying the same to mechanical devices, for the purpose of developing power to be used in the generation of electricity, or for any mechanical purpose. That the place of intended use is the Southeast quarter of section ten (10), township twenty-seven (27) south, range thirty-two (32) east, M. D. M.; that the means by which he intends to divert the same are, by means of

78 dams, tunnels, and by means of a canal, consisting of ditches, flumes, tunnels, pipes and conduit, all of the capacity and size sufficient to carry said 30,000 miner's inches of water from the intended point of diversion to the point of use thereof.

Dated March 9th, 1902.

G. O. NEWMAN,  
*Appropriator.*

Witness:

T. M. SHAW.

I hereby certify the foregoing to be a true copy of the original filed for record at request of Bender & Hewill, March 11, 1902, at 9:25 A. M.

CHAS. A. LEE,  
*Recorder,*  
By C. S. MERONEY,  
*Deputy.*

*Notice of Appropriation.*

Notice is Hereby Given: That the undersigned, H. S. Fisher does hereby claim all the water of the Kern River flowing at this intended point of diversion to the extent of one thousand inches, measured under a four-inch pressure; said water to be diverted at a point in the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Sec. 17, Twp. 26 S., Range 33 E., M. D. B. & M., on the right of way of the Kern River Company near where its canal or flume crosses Kern River, in the County of Kern, and State of California, where this is posted. That the purposes for which he claims it are as follows: For the purpose of applying the same to mechanical devices, for the purposes of developing power to be used in the generation of electricity, or for any mechanical purpose. That the place of intended use is  
79 at power-house of the Kern River Company, now constructed in Section 10, Township 27 South, Range 32 East, M. D. B. & M., in the County of Kern, State of California; that the means by which he intends to divert the same are, by means of dams, tunnels, and by means of a canal, consisting of ditches, flumes, tunnels, pipes, pumps, and conduit, all of the capacity and size sufficient to carry one thousand miner's inches of water from the intended point of diversion, to the point of use thereof.

That the place of intended diversion and the route of intended conveyance of said water are within the limits of the Sierra Forest Reserve.

Dated July 1st, 1905.

H. S. FISHER,  
*Appropriator.*

Witness:

FRED R. BELKNAP.



STATE OF CALIFORNIA,  
County of Kern, ss:

H. S. Fisher, being duly sworn, says: That on the first day of July, 1905, I resided at Borel, in said County; that on said day and date I posted a copy of notice of appropriation, herewith attached, on a cottonwood tree near the point of diversion in the S. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  Sec. 17, Twp. 26 S., Range 33 E., M. D. B. & M.

H. S. FISHER.

Subscribed and sworn to before me, this first day of July, 1905.  
[SEAL.] CHAS. C. TAYLOR,

Notary Public.

80 Recorded at the request of Bakersfield Abstract Co., Jul.  
7, 1905, at 50 min. past 8 A. M., in book 2 of Water Rights,  
page 350, Kern County Records.

CHAS. A. LEE,  
Recorder.

#### EXHIBIT No. 4.

*Map Filed June 3, 1898, by Kern River Company.*

Certificate and notations appearing on this map are as follows:

I, Chas. Forman, do hereby certify that I am President of the Kern River Company, a corporation organized and existing under the laws of the State of Maine, that is applicant for the Right of Way for canal described on this map; that H. Hawgood who subscribed the accompanying affidavit, is the chief engineer of the said company; that the survey of the canal, as accurately represented on this map and by the accompanying field-notes, was made under the authority of the company; that the said canal as represented on this map and by said field-notes, was adopted by the company, by resolution of its board of directors on the 20th day of October, 1897, as the definite location of said canal, described as follows: the initial point of said survey being N.  $28^{\circ} 09'$  E. 2762 feet distant from the  $\frac{1}{4}$  sec. corner between Secs. 33 and 4, townships 25 and 26 south, range 33 east, M. D. M.; the length of said canal being 66,400 feet and the terminal point thereof being N.  $81^{\circ} 12'$  W. 1691 feet distant from the S. E. corner of Sec. 10, township 27 south range 32 east, M. D. M., and that no lake or lake-bed, stream, or stream-bed, is used for the said canal except as shown on this map; and that the map has  
81 been prepared to be filed for the approval of the Secretary of the Interior in order that the company may obtain the benefits of Sections 18 to 21 inclusive of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture and for other purposes," and of section 2 of an Act of Congress approved May 11, 1898, entitled "An act to amend an act to permit the use

of the right of way through public lands for tram-roads, canals and reservoirs and for other purposes," enlarging the purposes for which right of way granted under said sections 18 to 21 of the Act of March 3, 1891, may be used. And I further certify that the right of way for such canal is desired solely for the purposes prescribed by the aforesaid acts.

(Signed)

CHAS. FORMAN,  
*President of the Kern River Company.*

Attest:

[SEAL.] (Signed) H. C. McKEE,  
*Secretary.*

This map was first filed in this office on the 3d day of June, 1898.  
It was filed 3d day of November, 1898.

(Signed)

S. W. AUSTIN,  
*Register.*

A. M.

J. I. P.

Dept. of the Interior.

Apr. 14, 1899.

Approved subject to all valid existing rights.

(Signed)

E. A. HITCHCOCK,  
*Secretary.*

*Decree in Miller & Lux, a Corporation, et al. vs. A. Brown Co., a Corporation, et al., in Superior Court, County of Kern, State of California.*

In the Superior Court, County of Kern, State of California.

MILLER & LUX, a Corporation; KERN COUNTY LAND COMPANY, a Corporation; Farmers' Canal Company, a Corporation; Pioneer Canal Company, a Corporation; Buena Vista Canal Company, a Corporation; Kern Island Irrigating Canal Company, a Corporation; James Canal Company, a Corporation; Anderson Canal Company, a Corporation; Stine Canal Company, a Corporation; Plunkett Canal Company, a Corporation; James & Dixon Canal Company, a Corporation; Joice Canal Company, a Corporation; Kern River Canal and Irrigating Company, a Corporation, and Central Canal Company, a Corporation, Plaintiffs,

vs.

A. BROWN COMPANY, a Corporation; ANDREW BROWN, JOSE CHICO, Ann Lurch, John Doe Lurch, Julia Scoopin, John Doe Scoopin, Francisco Apalata, Thomas W. Pack, Magnus Petersen, Mrs. E. L. Tibbetts, John Doe Tibbetts, H. L. Cook, C. A. Cook, J. L. Hooper, J. V. Roberts, Thomas J. Gilbert, Gabriel Luz, J. W. Summer, Joseph Cyrus, Charles B. Tibbetts, A. J. Perry,  
83 William M. Orr, James Stavert, Sara Jane Stavert, John Neill, Annie Neill, Stephen Barton, Mrs. M. J. Beaty, John Doe Beaty, John Kelly, Olga Kelly, Kern River Company, a Corporation, Sued Herein as First Roe Company; Second Roe Company, C. F. Bennett, Sued Herein as A. Doe; B. Doe, C. Doe, D. Doe, E. Doe, F. Doe, G. Doe, H. Doe, I. Doe, J. Doe, K. Doe, L. Doe, M. Doe, N. Doe, O. Doe, P. Doe, Q. Doe, R. Doe, S. Doe, T. Doe, U. Doe, V. Doe, W. Doe, X. Doe, Y. Doe, and Z. Doe, Defendants.

*Decree.*

The defaults of Mrs. M. J. Beaty and John Doe Beaty, defendants in the above-entitled action, for failure to appear and answer the complaint of plaintiff herein after due and regular service of the summons in the action, having been duly entered herein, and the defendants, The A. Brown Company, sued herein under the name of A. Brown Company, a corporation, Andrew Brown, J. L. Hooper, James Stavert, Sara Jane Stavert, John Kelly, Olga Kelly, C. F. Bennett, sued herein as A. Doe, Lulie Bennett sued herein as B. Doe, and Kern River Company, a corporation, sued herein as First Roe Company, having duly appeared herein by their respective attorneys, and being now before the Court and consenting to a trial of the action and the entry of the within decree, and the action having been dis-

missed as against all other defendants except those herein  
 84 named, and a jury being expressly waived, the following contract is offered and read in evidence:

(Here follows Contract between Miller & Lux and Kern River Company introduced present case of United States vs. Kern River Company, et al., as Exhibit 6. The portions of this contract material on this appeal are as follows:)

This agreement, made and entered into the 23d day of December, 1904, by and between Miller & Lux, a corporation, Kern County Land Company, a corporation, Farmers' Canal Company, a corporation, Pioneer Canal Company, a corporation, Buena Vista Canal Company, a corporation, Kern Island Irrigating Canal Company, a corporation, James Canal Company, a corporation, Anderson Canal Company, a corporation, Stine Canal Company, a corporation, Plunkett Canal Company, a corporation, James & Dixon Canal Company, a corporation, Joice Canal Company, a corporation, Kern River Canal and Irrigating Company, a corporation, and Central Canal Company, a corporation, the parties of the first part, hereinafter referred to as the plaintiffs, and the Kern River Company, a corporation, party of the second part:

Witnesseth, That whereas, a suit was brought in the Superior Court of the State of California, in and for the county of Kern, by Miller & Lux, et al., against the Kern River Company, et al., defendants, in which said suit a petition was filed by the Kern River Company for the removal of said cause to the United States Circuit

55 Court of the Southern District of California, and said cause was removed to said Circuit Court, and a motion has been made therein by the plaintiffs to remand the same to the Superior Court in and for the County of Kern, which motion is still pending in the United States Circuit Court; and

Whereas subsequently the said Miller & Lux, Kern County Land Company, et al., commenced a suit in the said Superior Court of the State of California, in and for the County of Kern, against the Kern River Company and others, as defendants, respecting the rights of the said several parties to the waters of Kern River, and it is now desired by the said parties that said litigation be settled for the purpose of making said settlement and in consideration thereof;

It is now agreed between the plaintiffs in said suits and the Kern River Company, one of the defendants,

#### Second.

For the purpose of confining the water of Kern River in one channel above, and diverting dam or weir of the Kern River Company at Green Street, Kernville, and for the purpose of preventing water from flowing into certain ditches now taking water out of said river, the Kern River Company shall perform in a thorough and workmanlike manner all the work set forth and specified in Exhibit "B" hereunto attached and made a part hereof. This work shall be done under the supervision and to the entire satisfaction of Arthur L. Adams, whose

decision on any question relating thereto shall be binding and conclusive upon the parties.

86

## Fourth.

After the canal is completed in the manner herein provided for and agreed, including the construction of the bulkheads in the said canal, the said Kern River Company shall turn the waters of the Kern River into the said canal to the full extent of its safe carrying capacity, if so much water shall be flowing in the said river, and it shall continuously conduct the waters of the said river through the said canal to the extent of its safe carrying capacity, provided and whenever so much water is flowing in the said Kern River. It is understood that the canal shall never be filled to such an extent as that the surface of the water shall be less than one (1) foot from the top of the cement lining. Whenever the flow of water in the river at the headworks of the Kern River Company shall not be sufficient to fill the canal to its safe carrying capacity, then all of the water flowing at that point shall be diverted into the canal. Said water shall be permitted to flow continuously through the said canal and flumes of the Kern River Company and used by it for power purposes only.

## Ninth.

The Kern River Company shall, on or before the 1st day of August, 1905, install, at a point in the said Kern River at or below the junction of the North Fork with the South Fork of said river, a pumping-plant having a minimum capacity of twenty (20) cubic feet per second for the purpose of pumping the surplus water which flows down the North Fork of said Kern River into the flume

87 or canal of the Kern River Company, if any such there be, and shall from the date of installation continuously operate said plant for the purpose of pumping all the water which shall flow down the said North Fork, not exceeding — (20) cubic feet per second, except for such time as may be required for making necessary repairs, but the Kern River Company shall not be required to operate its pumping-plant whenever the said canal is carrying its full safe carrying capacity of water, nor shall it be required to pump to exceed twenty (20) cubic feet per second at any time.

## Tenth.

The Kern River Company shall, within — (—) days from the date hereof, obtain such stipulations, consents or disclaimers as are necessary to enable the plaintiffs to procure against J. M. Hooper, James Stavert, Sarah Jane Stavert, Mrs. M. J. Beaty, John Kelly and Olga Kelly, defendants in the action heretofore instituted by the plaintiffs in the Superior Court in and for the County of Kern, State of California, against The A. Brown Company and others, the entry of a decree adjudging and determining that the rights of

said defendants to the water of Kern River and any right to use the same that may have been acquired by them by any means have been acquired by and are now vested in the Kern River Company, and that said defendants are not entitled to take, use, or divert any water from the North Fork of Kern river and that the Kern River Company, the grantee of said defendants, is not entitled to take or

88 divert any water from said Kern river for any purpose whatsoever except the generation of power at its power-house on Kern river and except the two (2) cubic feet per second mentioned in the eleventh paragraph, and except the one-fifth (1/5) of one (1) cubic foot per second for domestic use of power house site as set forth in paragraph eleventh. The decree so to be entered shall specifically describe all the lands formerly owned by the defendants, J. M. Hooper, James Stavert, Sarah Jane Stavert, Mrs. M. J. Beaty, John Kelly, and Olga Kelly, and acquired by the Kern River Company, and shall adjudge that the rights of said defendants and the Kern River Company in and to the waters of Kern river by virtue of their ownership of said lands for all purposes except for power purposes, are subject and subordinate to the rights of the plaintiffs, and that none of the water of Kern river shall be used upon said lands for any purpose by any of the defendants or by the Kern River Company, or by the grantees of any of said parties. The decree so to be entered shall also specifically describe all of the lands formerly owned by the defendant The A. Brown Company, which were conveyed to the Kern River Company by deed dated —, 1904, and shall adjudge that the rights of said defendants The A. Brown Company, and the Kern River Company, in and to the waters of the North Fork of Kern river, by virtue of their ownership of said lands for all purposes except for power purposes, are subject and subordinate to the rights of the plaintiffs, and that none of the waters of the North Fork of Kern river shall be used upon said lands for any purposes by the defendants. The A. Brown Company

89 or the Kern River Company, or by the grantees of said parties, and the decree shall also provide that the rights of the Kern River Company in and to the waters of Kern River, by virtue of its ownership of said lands or by virtue of its ownership of the lands of C. F. Bennett hereinafter described are likewise subject and subordinate to the rights of the plaintiffs, and that none of the waters of Kern river shall be used upon said lands for any purpose by the Kern River Company or its grantees, except as herein expressly provided; and the Kern River Company will not convey any of the lands formerly owned by any of said parties until after the entry of said decree, and any conveyance which it may make shall expressly provide that the grantee shall be bound by said decree to the same extent as if he or she or it were named as party defendant in said action in place and stead of said Kern River Company. Said decree shall provide also that neither the Kern River Company nor any of its grantees shall pump any water upon or for use upon any of the lands referred to in this agreement, in excess of one (1) cubic foot per second. Said decree shall also adjudge that the rights of

the Kern River Company in and to the waters of Kern river, by virtue of their ownership of the following described lands:

The south half of the southwest quarter, northeast quarter of southwest quarter, southeast quarter of northwest quarter, and northeast quarter of northwest quarter, also commencing at the southwest corner of the northwest quarter of the southwest quarter of section nine (9), township twenty-six (26) south, range thirty-three (33) east, Mount Diablo Base and Meridian; thence north two (2) chains, east three (3) chains, north twenty-five (25) degrees thirty (30) minutes east, seven (7) chains and seventy (70) links north forty-six (46) degrees thirty (30) minutes eighteen (18) chains and forty-five (45) links to the northeast corner of the northwest quarter of the southwest quarter of said section; thence south twenty (20) chains; thence west twenty (20) chains to place of beginning; all in section — (9), township twenty-six (26) south, range thirty-three (33) east, Mount Diablo Base and Meridian, estimated to contain two hundred and thirty (230) acres, acquired by said Kern River Company by deed executed by C. F. Bennett and wife to said Company on the 29th day of May, 1902, and the water rights acquired under and by virtue of said deed are likewise subject and subordinate to the rights of the plaintiffs, and that none of the water of said river shall be used upon said lands for any purpose by the said Kern River Company or by the grantees of said Company, except as herein expressly provided.

#### Eleventh.

The Kern River Company agrees that all of the water of Kern River diverted by it into said canal shall be used by it solely for the purpose of generating power and that it will not divert from said river or make use of any waters from said river for any other purpose than conducting the same through said canal to its power house for the generation of power, provided, however, that it may take into and through the Neill-Stavert Ditch not to exceed  
 91 two (2) cubic feet per second of water, which said water is to be conducted upon what is known as the Beaty Ranch and Stavert place, and to be used for domestic purposes and for stock or irrigation on the said Beaty Ranch and Stavert place, only, and so much thereof as shall not be used for domestic purposes, stock or irrigation on said Beaty Ranch or Stavert place, shall be conducted by the Kern River Company into its said canal; and further reserving the right to use so much water as may be necessary for domestic and garden purposes, for the buildings and residences situated at what is called the Power House Site, which amount is hereby fixed at one-fifth ( $1/5$ ) of one (1) cubic foot per second; and further reserving the right to pump not to exceed one (1) cubic foot per second of water upon or for use upon the lands acquired and to be acquired by the Kern River Company and referred to in this agreement.



## Twelfth.

The suit brought by Miller & Lux and others against the Kern River Company and others in the Superior Court in and for the county of Kern and removed to the United States Circuit Court as hereinbefore recited, shall be dismissed without prejudice, each of the parties paying its own costs.

## Twentieth.

Except at such times as may be necessary for making repairs to or cleaning the said canal, the surface of the water in said canal (not including the forebay at the Power House), shall not be allowed to fall lower than an average of three (3) feet below the top of the cement lining on the banks of said canal, the said three  
92 (3) feet to be measured along the surface of the said lining at right angles to the water line and the Kern River Company shall install and maintain such bulkheads or other appliances in the canal as may be necessary to maintain the aforesaid water level. But the Kern River Company shall not, by the use of said bulkheads or otherwise, use said canal for reservoir purposes, but subject to the aforesaid obligation to maintain the said water level the water shall be allowed to flow through the said canal in a continuous stream which shall be as nearly uniform as practicable, and shall conform as nearly as practicable to the flow of the river.

## Twenty-third.

The Kern River Company shall not at any time construct any reservoir for the purpose of gathering, holding or impounding any water flowing in Kern River or which may be precipitated upon the water-shed of Kern River and will not use, unless it shall previously have obtained the written consent of the plaintiffs thereto, any water which may be stored or impounded or gathered in any reservoir by any other person, nor will it, if any other person or persons shall construct a reservoir or reservoirs for said purpose, ever at any time, unless it shall have previously obtained the written consent of the plaintiffs thereto, permit any part of the plant or transmission lines constructed, owned, or operated by said Kern River Company to be used to transmit power which may be generated by use of water stored in such reservoir or reservoirs, nor will said Kern River Company, unless it shall previously obtain the written consent  
93 of the plaintiffs thereto, purchase or be in any manner interested in any power so generated.

## Twenty-fourth.

And there shall be entered a decree in the Superior Court of the State of California in and for the County of Kern, in the said case of Miller & Lux, et al., vs. the A. Brown Co., et al., enjoining and

restraining the Kern River Company, a defendant therein, and its agents, servants, and attorneys, and all persons claiming by, through or under it, forever enjoining and restraining them from constructing any reservoir or reservoirs for the purpose of gathering, holding, or impounding any water flowing in Kern River, or which may be precipitated upon the watershed of Kern river and also forever enjoining and restraining said Kern River Company from permitting any of the plant or transmission lines constructed, owned or operated by said Kern River Company, to be used to transmit power which may be generated by the use of water stored in any reservoir or reservoirs constructed by any other person or persons unless it shall previously obtain the written consent of the plaintiffs hereto and from purchasing or being in any manner interested in any power so generated.

And in the event any other person or persons shall construct a reservoir or reservoirs for the purpose of gathering, holding, or impounding any water flowing in Kern river, or which may be precipitated upon the watershed of Kern river, and the said Kern River Company, or its successors in interest, shall at any time take into its

94 canal any of the water so impounded, then and in that event the said plaintiffs herein shall be entitled to an injunction restraining the diversion of such water from said Kern river and into the canal of the said Kern River Company, but no injunction or restraining order shall be issued in any suit brought by the plaintiffs, or any of them, to enforce their rights in such water, or to prevent the Kern River Company, or its successors in interest, from diverting the same from Kern river without at least ten (10) days' notice to the Kern River Company, or its successors in interest, of the application for such injunction, to the end that it may have an opportunity to oppose the granting of any such injunction or restraining order.

If plaintiffs, or any of them, shall construct any such reservoir or reservoirs above the headworks of the Kern River Company, they shall not be so constructed or used as to impair or prevent the diversion or use of the said stream for power purposes by the Kern River Company as hereinabove provided.

#### Twenty-sixth.

This agreement and all of its provisions shall be binding upon the successors in interest of the parties hereto in any lands, water rights, other real property or interests in such real property now owned or possessed by the said parties in the county of Kern, state of California.

In witness whereof, the said respective plaintiffs, parties of the first part hereto, have caused these presents to be subscribed in duplicate and their respective corporate names and seals to be hereunto affixed by resolution of their Boards of Directors duly authorizing and directing the same, and directing the Presidents and Secretaries of said respective corporations so to sign, seal, execute,

95

and deliver the same on behalf of said corporations and each of them, and the said defendant, the Kern River Company, a corporation, has also caused these presents to be subscribed in duplicate and its corporate name and seal to be thereunto affixed by its President and Secretary thereto duly authorized by resolution of its Board of Directors authorizing and directing the execution of the same.

MILLER & LUX,  
By HENRY MILLER,  
*President,*

[SEAL.] By DAVID BROWN,  
*Secretary.*

KERN COUNTY LAND COMPANY,  
By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. DRUM,  
*Secretary.*

FARMERS' CANAL COMPANY,  
By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*

PIONEER CANAL COMPANY,  
By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*

BUENA VISTA CANAL COMPANY,  
By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*

KERN ISLAND IRRIGATING CANAL  
COMPANY,  
By WALTER JAMES,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*

ANDERSON CANAL COMPANY,  
By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*

STINE CANAL COMPANY,  
By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*

PLUNKETT CANAL COMPANY,  
By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*  
 JAMES & DIXON CANAL COMPANY,  
 By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*  
 97 JOICE CANAL COMPANY,  
 By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*  
 JAMES CANAL COMPANY,  
 By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*  
 KERN RIVER CANAL AND IRRIGATING  
 COMPANY,  
 By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*  
 CENTRAL CANAL COMPANY,  
 By WILLIAM S. TEVIS,  
*President,*

[SEAL.] By F. G. MUNZER,  
*Secretary.*  
 KERN RIVER COMPANY,  
 By CHAS. FORMAN,  
*President,*

[SEAL.] By H. S. McKEE,  
*Secretary.*

(Duly acknowledged by all parties.)

And findings and conclusions of law being waived and the parties further waiving all omissions or defects in the pleadings and stipulating that any and all amendments to the pleadings necessary to support this decree may be deemed to have been made and consenting to the entry of this decree.

98 And it further appearing from such contract that the plaintiffs are entitled to injunctive relief as herein provided;

Now, therefore, it is adjudged and decreed by the Court that the defendant, the Kern River Company, and its agents, servants and attorneys, and all persons claiming by, through or under it, be and they hereby are forever enjoined and restrained from constructing any reservoir or reservoirs for the purpose of gathering, holding or impounding any water flowing in Kern River, or which may be precipitated upon the watershed of Kern River, and if any other person or persons shall construct a reservoir or reservoirs for said purpose,

ever at any time, unless it shall have previously obtained the written consent of the plaintiffs thereto, from permitting any part of the plant or transmission lines constructed, owned or operated by said Kern River Company to be used to transmit power which may be generated by the use of water stored in such reservoir or reservoirs, and unless it shall previously obtain the written consent of the plaintiffs thereto, from purchasing or being in any manner interested in any power so generated.

It is further adjudged and decreed by the Court that the defendant, Kern River Company, has acquired and is now the owner of the lands situate in the County of Kern, State of California, formerly owned by the defendants, J. L. Hooper, James Stavert, Sara Jane Stavert, Mrs. M. J. Beaty, John Kelly, Olga Kelly, C. F. Bennett, sued herein under the name of A. Doe, Lulie Bennett, sued herein as B. Doe, and The A. Brown Company, sued herein under the name of A. Brown Company, and described as follows, to wit:

All of the southeast quarter of the northeast quarter of section thirty-three (33) lying east of the west bank of the west fork of Kern River, and the northeast quarter of southeast quarter of section thirty-three (33), township twenty-five (25) south, range thirty-three (33) east, Mount Diablo Base and Meridian.

Lot six (6), Block L, Kernville Townsite, and the south half of the southeast quarter of section thirty-three (33) township twenty-five (25) south, range thirty-three (33) east, Mount Diablo Base and Meridian.

West half of the northwest quarter, southeast quarter of the northwest quarter, and the northwest quarter of the southwest quarter of section four (4); the east half of the northeast quarter, and the south half of the southeast quarter of section five (5); the northeast quarter, and the west half of the southeast quarter of section eight (8); the east half of the northwest quarter, the southwest quarter of the northwest quarter and the southwest quarter of section nine (9), township twenty-six (26), south; range thirty-three (33) east, Mount Diablo Base and Meridian.

The northeast quarter, the southeast quarter, and the east half of the southwest quarter of section seventeen (17), township twenty-six (26) south, range thirty-three (33) east, Mount Diablo Base and Meridian.

All that portion of the south half of the southeast quarter of section thirty (30), township twenty-six (26) south, range thirty-three (33) east, Mount Diablo Base and Meridian, lying east of the west line of the right of way of the Kern River Company's canal, as the said right of way has been surveyed by the said Kern River Company.

East half of the southeast quarter, section twenty-two (22), township twenty-five (25) south, range thirty-three (33) east.

South half of northwest quarter, section twenty-six (26), township twenty-five (25) south, range thirty-three (33) east.

Northeast quarter; north half of southeast quarter; southwest quarter of southeast quarter, and east half and the southwest quarter of

southwest quarter, section twenty-seven (27), township twenty-five (25) south, range thirty-three (33) east.

Southeast quarter of southeast quarter, section thirty-three (33), township twenty-five (25) south, range thirty-three (33) east.

West half of east half, section thirty-four (34); east half of northwest quarter, west half of northwest quarter, and southwest quarter of section thirty-four (34), township twenty-five (25), south, range thirty-three (33) east.

South half of southwest quarter, and southwest quarter of southeast quarter, section thirty-five (35), township twenty-five (25) south, range thirty-three (33) east.

101 Northeast quarter of northeast quarter, and southeast quarter of northeast quarter, section four (4), township twenty-six (26) south, range thirty-three (33) east.

That the defendant, Kern River Company, has also acquired and is now owner of the land situated in the said County of Kern, State of California, referred to in the contract hereinabove set forth, as a power-house site, and bounded and particularly described as follows, to wit:

East half of southwest quarter, and West half of southeast quarter; all of the southeast quarter of section ten (10) township twenty-seven (27) south, range thirty-two (32) east, Mount Diablo Base and Meridian.

It is further adjudged and decreed that all rights of the defendants, J. L. Hooper, James Stavert, Sara Jane Stavert, Mrs. M. J. Beaty, John Kelly, Olga Kelly, C. F. Bennett, Lulie Bennett, Andrew Brown, and The A. Brown Company, to the waters of the north fork, of the Kern River and any right to use the same that may have been acquired by them by any means, except any rights in the Town Ditch, have been acquired by and are now vested in the defendant Kern River Company, and that said Defendants, J. L. Hooper, James Stavert, Sara Jane Stavert, Mrs. M. J. Beaty, John Kelly and Olga Kelly, C. F. Bennett, Lulie Bennett, Andrew Brown and The A. Brown Company are not entitled to take, use or divert any water from the north fork of the Kern River, and are hereby forever enjoined and restrained from diverting or using any of the said

102 waters; and that the defendant Kern River Company, the grantee of said defendants, is not entitled to take or divert any water from said Kern River for any purpose whatsoever, except for the generation of power at its power-house on Kern River and except the two (2) cubic feet per second, and except also the one-fifth ( $1/5$ ) of a cubic foot per second for domestic use at the power-house mentioned in the eleventh paragraph of said agreement. That the rights of the defendant, Kern River Company, in and to the waters of Kern River, by virtue of its ownership of the lands hereinbefore described, or by virtue of its ownership of any land in said Kern County, except to divert and use the same for power purposes under the conditions contained in said agreement, are subject and subordinate to the rights of the plaintiffs, and that none of the waters of Kern River shall be used upon said lands for any purpose

by the said defendant Kern River Company or its grantees, except as above provided, and the defendant Kern River Company, its officers, agents, employees, servants and attorneys, its successors, grantees and assigns, are hereby forever enjoined and restrained from diverting or using upon the said lands any of the waters of the Kern River except as provided in the eleventh paragraph of the said agreement. That neither the Kern River Company nor any of its grantees shall pump any water upon or for use upon any of the lands referred to in this decree in excess of one (1) cubic foot per second. That the said defendant Kern River Company, its officers, agents, employees, servants and attorneys, its successors, 103 grantees and assigns, are hereby forever enjoined and restrained from pumping any water upon or for use upon any of the lands referred to in this decree in excess of one (1) cubic foot per second.

It is further adjudged and decreed that except so far as the rights of the defendant Kern River Company and the other defendants, if any, it or they have, to divert or use the waters of Kern River are by said contract and this decree expressly limited, neither said contract nor this decree shall be construed as determining or changing the rights of any of the parties to this action, if any they have, to divert or use the waters of said Kern River, or as subordinating the rights of any of the said parties therein, if any they have, to the rights of any other parties.

Nothing in this decree contained shall in any manner affect any rights which the defendant, A. Brown or The A. Brown Company, or any other defendant has, or may have in the ditch known as the "Town Ditch" which takes water from the North Fork of the Kern River above the Town of Kernville, nor be deemed in any way to prohibit them or any of them from taking or using water through said ditch from the North Fork of the Kern River according to their respective rights, nor shall such taking or using of water be a violation of the injunction in this decree provided for. This decree is not to be constructed as an adjudication as to such rights as to their existence or nonexistence.

This decree shall not be construed as an adjudication 104 against Andrew Brown or The A. Brown Company as to the ownership of any land other than the following:

In Township 25 S., R. 33 E., M. D. B. & M. Section 22: East  $\frac{1}{2}$  of Southeast Quarter.

Section 26: South half of Northwest Quarter.

Section 27: North half and Southwest Quarter of Southeast Quarter and East half of Southwest Quarter and Northeast Quarter.

Section 33: Southeast Quarter of Southeast Quarter.

Section 34: West half of Northeast Quarter and East half of Northwest quarter; and West half of Southeast Quarter and Southwest Quarter.

Sec. 35: Southwest quarter of Southeast Quarter and South half of Southwest Quarter.

In Township 26 S., R. 33 E., M. D. B. & M.



In Section Four; Southeast Quarter of Northeast Quarter and Northeast Quarter of Northeast Quarter.

J. W. MAHON,  
*Judge.*

Done in open court this 29th day of December, 1904.

EXHIBIT No. 7.

*Map Filed January 19, 1905, by Kern River Company.*

Certificates and notations appearing on this map are as follows:

I, Chas. Forman, do hereby certify that I am the President of the Kern River Company; that the canal described as follows: The initial point of said survey being North  $27^{\circ} 43'$  East, 3006.5 feet distant from the quarter section corner of Sections 33 and 4, Townships 25 and 26 South, Range 33 East, M. D. M., the length of said canal being 63,019.7 feet, and the terminal point thereof being North  $89^{\circ} 20'$  West, 1087.3 feet distant from the southeast corner of Section 10, Township 27 South, Range 32 East, M. D. M., was actually constructed as set forth in the accompanying affidavit of G. O. Newman, Chief Engineer, on the exact location represented on the map and by the field-notes approved by the Secretary of the Interior on the 14th day of April, 1899, except in so far as the route indicated upon the present map of the Amended Definite Location differs therefrom; that the company has in all things complied with the Act of Congress of March 3d, 1891, granting the rights for canals, ditches, etc., through the public lands of the United States.

(Signed)

CHAS. FORMAN,  
*President of Kern River Company.*

Attest:

H. S. McKEE,  
*Secretary.*

I, Chas. Forman, do hereby certify that I am President of the Kern River Company; that G. O. Newman, who subscribed the accompanying affidavit, is the chief engineer of said company; that the amended survey of the said amended definite location of the said canal, as accurately represented on this map and by the accompanying field-notes, was made under authority of the company; that the company is duly authorized by its Articles of Incorporation to construct the said canal upon the location shown upon this map; that the said canal as represented on this map and by said field-notes was adopted by the company by resolution of its board of directors on the 23d day of Jan., 1905, as the amended definite location of said canal, described as follows: The initial point of said survey being N.  $27^{\circ} 43'$  E., 3006.5 feet distant from the quarter section corner of Sections 33 and 4, Townships 25 and 26 South, Range 33 East, M. D. M., the length of said canal being 63,019.7 feet, and the terminal point thereof being N.  $89^{\circ} 20'$

W., 1087.3 feet distant from the Southeast corner of Section 10, Township 27 South, Range 32 East, M. D. M.; and that no lake or lake-bed, stream or stream-bed, is used for the said canal except as shown upon this map; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws, and for other purposes," and Section 2 of the Act approved May 11, 1898; and I further certify that the right of way herein described is desired for public purposes.

(Signed)

CHAS. FORMAN,

*President Kern River Company.*

Attest:

H. S. McKEE,

*Secretary.*

U. S. Land Office,

Independence, Cal., Jan. 19, 1905.

I hereby certify that this map was filed this 19th day of January, 1905 and that vacant public land is affected by the proposed right of way.

107

(Signed)

S. W. AUSTIN,

*Register.*

U. S. Land Office,

Visalia, Cal.

Refiled September 2, 1905.

GEO. W. STEWART,

*Register.*

J. I. P.

A. M.

Dept. of the Interior.

Nov. 27, 1905.

Approved subject to all valid existing rights.

(Signed)

E. A. HITCHCOCK,

*Secretary.*

Before refiling Sept. 2, 1905, the second certificate above noted was put on the map.

## EXHIBIT No. 8.

Department of Agriculture.

Office of the Secretary.

Washington, D. C., March 12, 1908.

Kern River  
Co. Canal.  
(Interior, Act)  
(March, 3, 1891)  
9/2/05-Sierra (South.)

Division of Mails & Files.  
Received Mar. 16, 1908.  
To Gen'l Land Office,  
Dept. of the Interior,  
Div'n of Mails and Files.  
Prepare reply Mar. 16,  
1908, for Secretary's  
signature

1176

108 The Honorable Secretary of the Interior.

SIR:

On November 27, 1905, Secretary of the Interior Hitchcock approved the map filed by the Company in this case January 19, 1905, in the United States Land Office at Independence, California.

In my letter to you dated June 14, 1907, in the case of the Sierra Ditch and Water Company I informed you that this Department would report to you upon several rights of way in National Forest in California, the maps of which were approved in your Department under the Act of March 3, 1891, upon the certification by the applicants that the rights of way were sought for the main purpose of irrigation, while they are in fact used solely for generating electric power, with no pretense of a use for irrigation.

An investigation by the Forest Service of the Kern River Company's right of way discloses the fact that the right of way is used solely for power purposes, and that many years before the Company filed its maps in your Department the entire flow of Kern River below the Kern River Company's canal was appropriated by other parties for irrigation, and that the Kern River Company is now compelled by a permanent court decree to make no permanent diversion of any water from the Kern River, and the Kern River Company has no right to the use of the water except for power purposes.

In view of these facts I respectfully recommend that you revoke the approval of the Kern River Company's map. I assume that since the right of way has not been and could not be, used by the applicant

109 for the main purpose of irrigation, that the Company simply did not come within the grant of March 3, 1891, and that since the Secretary of the Interior could not give the Company any right to which it was not entitled under the grant, the approval of the maps by Secretary Hitchcock may properly be considered by you as having no legal effect.

I shall be glad to give you a report in this matter, more in detail, if you so desire.

Very respectfully,

JAMES M. WILSON,  
*Secretary.*

EXHIBIT No. 10.

In reply please refer to C. & R. File No. 41. "F" WPJ. CAO.  
WRJ.  
"F."

Department of the Interior.

General Land Office.

Washington, November 18, 1909.

Address only the Commissioner of the General Land Office.

Kern River Company Right of Way.

Messrs. Britton and Gray,  
Attorneys for Kern River Co.,  
Glover Building,  
Washington, D. C.

SIRS:

I herewith inclose copy of departmental decision of the 12th instant, in the above-entitled case and have to advise you as attorneys for the company that it will be allowed sixty days within which to proceed in accordance therewith, failing in which, the case will be prepared for submission to the Department of Justice as directed therein.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

A. C. Balch testified on behalf of the defendant, which testimony in narrative form is in words and figures as follows:

*Testimony of A. C. Balch for Defendant.*

(Title of Court and Cause.)

A. C. BALCH, a witness called in behalf of the defendant, testified as follows:

He was an electrical engineer by profession and had been general manager of the Kern River Company from a time prior to the construction of the Canal until he ceased his connection with the Pacific Light and Power Co. (which owned the Kern River Co.) some time in 1913 or 1914. Construction was concluded about December 13,

1904. He first became connected with the defendant company in 1901. The Kern River and Los Angeles Electric Co. (the first company) was succeeded by the Kern River Co. He and two others who owned the Pacific Light and Power Co. bought the stock of the Kern River Co. They had to acquire various water rights like the Stavert canal, some rights from A. Brown, and some other rights down in Hot Springs Valley that were interfered with. It was the intention to use part of the water for irrigation purposes in Hot

111     Springs Valley, through which the canal ran, and a part of it just below Kernville through the Beatty Ranch and Stavert property, which had been acquired. They expected to show a saving in water by confining it in a canal, the same as on the San Gabriel River, and thus be able to acquire a 10% interest in the flow of the Kern River from the irrigators below, finally being able to sell this water below the mouth of the Kern River in the valley. They had these things in mind so far as the irrigation part of it went until Miller and Lux and others enjoined the diversion of the water from Kern River. By "below" he meant in the San Joaquin Valley around Bakersfield after the river debouches into the valley. The agreement (Plaintiff's Ex. 6) was the compromise agreement with Miller and Lux. The map (Defendant's Ex. "A") was prepared under his direction and the lands acquired were shown in red. He bought riparian rights as well as irrigation rights. The distance from the power-house (about 12 miles below Kernville) to the point where the river debouches into the valley, is about 16 or 17 miles. The stream is practically confined in a box canyon for this distance. The object of acquiring the lands shown in red on Defendant's Exhibit "A" was to acquire all conflicting interests, such as riparian rights, ditch rights, etc., that might interfere with the project, from the intake to the power-house site in order to avoid subsequent litigation. Down below the power-house site the company had in mind no lands to be irrigated. They did not expect to use it that way. In the case of the San Gabriel, they had the water right and they disposed of the water right to anybody who was willing to buy

112     it. In that case they disposed of it to the Covina Irrigating Co. for about \$70,000. The Kern River case was a very much larger proposition and worth much more money:

Q. Then the object of the company was not to sell water, but to sell the water right?

A. No; we were expecting to sell water. There is a very large valley here known as the Hot Springs Valley; there are some very fine lands there susceptible to irrigation.

Q. That is, if it did not interfere with your use for power?

A. All of the water taken out from above there that was not necessary for power—

Q. You were going to probably use it for irrigation in the event you had not been restrained from doing so at that time when it would not interfere with your power project?

A. Yes; at the time of the year when there is plenty of water for power purposes there is more water than we need for power that can be used for irrigating.

The power-house tract comprised 40 acres and the diversion was made in the middle of the town of Kernville. The Brown land was bought because they had to control the irrigation, otherwise Brown would take the water out and use it when they wanted it. They were not going to need it when he wanted it for irrigation. There would be water in May, June and July, when the stream was in flood, to irrigate this land and all of this land during those months, a very valuable water right that could have been used but for the interference of the people below. These same lands could not have been irrigated without the Kern River Co. canal, not the land in Hot Springs Valley because it was 60 or 70 feet and more above the river. Prior to the construction of the canal and the filing of these suits by Miller and Lux and others, Kern River Co. did not enter into any contracts for the furnishing of water for irrigation purposes with people in Hot Springs Valley. The Pacific Light & Power Co. acquired the stock control of Kern River Co. in 1901. The Pacific Light & Power Co. furnished money to Kern River Co. to begin operations, the latter being the actual construction company. Kern River Co. never issued any bonds for construction purposes, the Pacific Light & Power Co. issuing bonds and using the proceeds in financing construction of the conduit by Kern River Co. The Pacific Light & Power Co. entered into the project because it was able through a contract to deliver power to the electric railways in Los Angeles. He was director and general manager of the Pacific Light & Power Co. for a long time, also of the Pacific Light & Power Corporation, which succeeded the Pacific Light & Power Co. He was aware of the difficulties the Kern River Co. was having with the Department of the Interior, in 1907, 1908 and 1909, in connection with the use for power instead of irrigation, and he prepared a history of the whole case for Judge Short and Britton & Gray, to be submitted to the Department of the Interior.

In connection with the foregoing testimony Defendant's Exhibit "A" was filed and consisted of a map which shows an aggregate area of 3040 acres of land by or through which the said Kern River flows which land was purchased as stated by A. C. Balch.

In connection with and following A. C. Balch's testimony defendant submitted the following statement of power sold and used for pumping water for irrigation of land and same was thereupon filed.

### *Memorandum.*

UNITED STATES

v.

KERN RIVER COMPANY.

The percentage of power used for pumping water for irrigation, based on figures already in evidence, is set forth hereunder:

Years.	K. W. hrs.	% of power used for irrigation.
1909 .....	2,408,776	5.7
1910 .....	3,743,776	7.6
1911 .....	4,236,266	8.9
1912 .....	7,354,799	21.3
1913 .....	10,661,549	27.1

Thereafter and at the end of said trial on November 22, 1918, counsel for the plaintiff, with the consent of counsel for defendant, moved said Court to amend the second amended bill making the Pacific Light and Power Corporation and Southern California Edison Company parties defendant. The Court thereupon entered an order allowing said amendment which was filed November 29, 1918, in words and figures as follows:

115      *Amendment to Second Amended Bill of Complaint.*

(Title of Court and Cause.)

To the Honorable Oscar A. Trippet, Judge of said Court:

Comes now the plaintiff herein, by the Attorney General, and by leave of Court amends the bill as follows:

The caption of the bill to read as stated in the caption of this amendment by inserting after the words "Kern River Company, a Corporation," the words "Pacific Light and Power Corporation, Southern California Edison Company," and adding the letter "s" to the word defendant:

After the words "Kern River Company, a corporation," in the preamble, page one of the bill, insert the words "Pacific Light and Power Corporation, a corporation, and Southern California Edison Company, a corporation."

After paragraph XIX of the bill and preceding the prayer, insert the words and figures:

XX.

"That the Pacific Light and Power Corporation is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in Los Angeles, within the State and Southern District of California."

XXI.

116      "That the Southern California Edison Company is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in Los Angeles, within the State and Southern District of California."

## XXII.

"That the Pacific Light and Power Corporation and Southern California Edison Company have acquired an interest in the property described herein."

The last of the prayer of the bill reading as follows:

"acquired by said defendant by virtue of the proceedings set forth herein, and forever quieting and confirming in plaintiff the title to said lands, as against any claim of right, title or interest to or in the same or any part thereof by virtue of said proceedings by said defendant, or anyone claiming under it, and enjoining said defendant from thereafter using said right of way so obtained until it has made application for the same and received the approval of the Secretary of the Interior under the said Act of February 15, 1901, and for such other and further relief as to the Court may seem just and equitable."

be amended to read as follows:

"acquired by said defendant, Kern River Company by virtue of the proceedings set forth herein, and forever quieting and confirming in plaintiff the title to said lands, as against any claim of right, title or interest to or in the same or any part thereof by virtue of said proceedings, by said defendants, Kern River Company Pacific  
117 Light and Power Corporation and Southern California Edison Company, or anyone claiming under it, and enjoining said defendants, Kern River Company, Pacific Light and Power Corporation and Southern California Edison Company from thereafter using said right of way so obtained until it has made application for the same and received the approval of the Secretary of the Interior under the said Act of February 15, 1901, and for such other and further relief as to the Court may seem just and equitable."

THOMAS WATT GREGORY,

*Attorney General of the United States;*

ROBERT O'CONNOR,

*United States Attorney;*

CLYDE R. MOODY,

*Assistant United States Attorney;*

H. P. DECHANT, *Attorneys for Plaintiff.*

"It is hereby stipulated and agreed that the above and foregoing is a correct statement of the case in the above cause, and that it shows how all questions involved in said cause arose and that it contains all the facts alleged and proved that are essential to a decision of such questions by the Circuit Court of Appeals of the United States for the Ninth Circuit.

"Dated Oct. 2d, 1919.

ROBERT O'CONNOR,

H. P. DECHANT,

*Attorneys for Plaintiff and Appellant.*

GIBSON, DUNN & CRUTCHER,

*Attorneys for Defendant and Respondent.*



"Approved and allowed as a stipulated statement of the case on appeal, and certified to be correct, this 3d day of October, 1919.

OSCAR A. TRIPPET,  
*District Judge.*"

118 United States Circuit Court of Appeals for the Ninth Circuit,  
No. 3406.

THE UNITED STATES OF AMERICA, Appellant,  
vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

*Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

119 At a Stated Term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the Third Day of February, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; Honorable William H. Hunt, Circuit Judge; Honorable Frank H. Rudkin, District Judge.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,  
vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

*Order of Submission.*

Ordered appeal in the above-entitled cause argued by Mr. H. Dechant, Assistant to Solicitor, Department of Agriculture, counsel for the appellant, and by Mr. James A. Gibson, counsel for the appellees, and submitted to the Court for consideration and decision.

120 At a Stated Term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Fifth Day of April, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present: The Honorable William W. Morrow, Circuit Judge Presiding; Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, William H. Hunt, Circuit Judges, and the Honorable Frank H. Rudkin, District Judge, before whom the causes were heard, Ordered that the type-written opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Judgment or Decree be filed and recorded in the Minutes of this Court in each of the causes in accordance with the opinion filed therein:

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

\* \* \* \* \*

121 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT & POWER Corporation, and Southern California Edison Company, Appellees.

*(Opinion U. S. Circuit Court of Appeals.)*

Section 18 of the Act of March 3, 1891 (26 Stat. 1095), provides:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed or may

hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Section 19 provides:

"That any canal or ditch company desiring to secure the benefits of this act, shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way."

122 This act was amended by the Act of May 11, 1898 (30 Stat. 404), and as amended provides that the rights of way thus acquired "may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power as subsidiary to the main purpose of irrigation."

The Kern River Company is a corporation organized under the laws of the State of Maine, for the purpose of carrying on the business of building, constructing, maintaining and operating canals, ditches, reservoirs, dams, flumes, aqueducts, pipes and pipe lines for carrying storing and supplying water for the purpose of irrigation, for the transmission of power, and for other purposes not material here. The Company filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, and the maps provided for by the act and the regulations applicable thereto, and made application for a right of way over the Sequoia National Forest in the State of California. On the 12th day of November, 1897, the Commissioner of the General Land Office, in a letter to the register and receiver at Visalia, California, called attention to the fact that "The two Acts of March 3, 1891, and May 14, 1896, are so different in the character of estates or permissions therein provided for, as well as in the use to which the rights of way may be devoted and the extent of such rights of way, that no permission or grant can be sanctioned which is based on the two acts."

Citing H. W. O'Melveny, 24 L. D. 560.

It may be here stated that the Act of May 14, 1896, provides:

“That the Secretary of the Interior be, and hereby is, authorized and empowered, under the general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power.”

The application for the right of way was accompanied by the certificate of the president and secretary of the Kern River Company, certifying among other things that the maps had been prepared for the approval of the Secretary of the Interior in order that the Company might obtain the benefit of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled “An Act to repeal timber culture laws and for other purposes,” and Section Two of the Act of May 11, 1898, entitled “An Act to amend an Act to permit the use of rights of way through public lands for tramroads, canals and reservoirs, and for other purposes,” and further certifying that the right of way for said canal was desired solely for the purposes provided by the aforesaid acts. On the 14th day of April, 1899, the Secretary of the Interior approved the maps and location as required by law, subject to all valid existing rights. The Kern River Company thereafter constructed its canal and powerhouse, transmission lines, and so forth, at a cost of approximately three million dollars. Some time prior to the 19th day of January, 1905, the Company filed an application with the Secretary of the Interior to amend its original maps and location to conform to the line of the ditch or canal as constructed. Again the acting Commissioner of the General Land Office, in a letter to the register and receiver at Visalia, said:

“The Company’s attention is called to the fact that unless the canal as shown by the amended survey of the amended definite location is desired for the purpose of irrigation only the application cannot be granted under the Act of March 3, 1891, (26 Stat. 1095), under which it was filed, but should be filed, under the Act of February 15, 1901, (31 Stat. 790), which grants permission to use the right of way over the public lands for irrigation and other purposes.”

124 Citing *Denver, Northwestern & Pacific Ry. Co. v. Hydroelectric Power Company*, 32 L. D. 452.

In support of this application the president and secretary of the Kern River Company certified as before that the approval of the Secretary of the Interior was sought “in order that the Company might obtain the benefits of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled ‘An Act to repeal timber culture laws, and for other purposes,’ and Section 2 of the Act of Congress approved May 11, 1898, and that the right of way described on said map was desired for public purposes.” On the 27th

day of November, 1905, the amended application was approved by the Secretary of the Interior, subject to all valid existing rights. On the 27th day of March, 1908, by direction of the Secretary of the Interior, notice was served upon the Kern River Company to show cause within ninety days from date of such notice why proceedings should not be instituted to cancel the grant of the right of way on the ground that the same was procured by the approval of said maps for the main purpose of irrigation, but was in fact used solely for power purposes. In response to this notice the Company made answer, and on the 18th day of November, 1909, the acting Commissioner of the General Land Office served notice on the Company that it would be given sixty days within which to further amend its amended application for a right of way, so as to bring the case within the provisions of the Act of February 15, 1901, and providing that such amended application should be accompanied by a proper relinquishment of all rights and interest acquired under the approvals given under the Act of 1891. With this request the Company failed and refused to comply.

It was stipulated among other things that the Kern River and Los Angeles Electric Power Company was organized as a corporation under the laws of the State of Arizona on May 18, 1895, and 125 that the object of the project was as follows:

"The intent and object of the enterprise is to use the flow of the north fork of Kern River for the generation of electrical energy, and to convey and sell the same to various consumers as far as Los Angeles. It is probably that eighty per cent of the total power generated would go to that city. The remaining twenty per cent being disposed of to the mining, milling and agricultural interests embraced in the first seventy miles of the line."

This Company was succeeded by the Kern River Company upon its organization, with the same officers and the purpose was to develop the same projects. The canal constructed by the Kern River Company has never been used for the purpose of irrigation, but has been used at all times solely for the purpose of carrying water to be used to generate electric power which the company and its successors sell mainly for the purpose of furnishing motive power to electric railways in the municipalities of southern California. A small percentage of the electricity is used to pump water for irrigation from wells along the course of the power lines.

The present suit was brought by the United States to vacate and set aside the order of the secretary of the Interior approving the maps of location for the ditch or canal filed under the Act of March 3, 1891; to cancel and annul the grant of the right of way; to quiet title in the plaintiff; and to restrain the defendants from using the right of way until they have complied with the requirements of the Act of February 15, 1901, relating to the construction of ditches over forest reserves for power purposes. From a decree of dismissal the present appeal is prosecuted.

Robert O'Connor, U. S. Attorney; Milton Bryan, Assistant U. S. Attorney; and H. P. Dechant, Assistant to the Solicitor, Dept. of Agriculture, Attorneys for the Appellant.

Gibson, Dunn & Crutcher and Roy V. Reppy, Attorneys for Appellees.

Before Gilbert and Hunt, Circuit Judges, and Rudkin, District Judge.

126 RUDKIN, *District Judge* (after stating the facts as above), delivered the opinion of the court:

From the foregoing statement it seems quite apparent that the appellees are operating and maintaining a canal used solely for the purpose of generating, manufacturing and distributing electric power, over a public forest reserve of the United States, without obtaining the necessary permit from the Secretary of the Interior and without authority of law. We say this is quite apparent because under the original act of 1891 the right of way could only be obtained for purposes of irrigation, and under the amendment of 1898 the right was not extended so as to include general power purposes. For whatever construction the words "may be used for purposes of a public nature" in the latter act might receive if standing alone, these general words are limited and qualified by the specific provision "or for the development of power, as subsidiary to the main purpose of irrigation," so that it is entirely manifest that a right of way for a canal for the development of power can only be obtained under the amendment of 1898, when such development is subsidiary to the main purpose of irrigation, and no such case is presented here. Has then the Government no standing in a court of equity to prevent such usurpation? The appellees claim not, first, because a suit of this nature will not lie without express legislative authority therefor; second, because the suit is barred by Section 8 of the Act of March 3, 1891; and lastly, because this court must accept the finding of the court below that the approval of the maps and location for the canal were not obtained through fraud or mistake.

1. In answer to the first objection it is only necessary to say that this is not a suit to declare a forfeiture of a land grant for breach of condition, but the ordinary suit to set aside the approval  
127 of the Secretary of the Interior on the ground of fraud and mistake, like the familiar suits prosecuted every day to set aside patents obtained by similar means. As said by the Supreme Court in *Noble v. Union River Logging Company*, 147 U. S. 165, in reference to a grant of a right of way for railway purposes:

"The railroad company became at once vested with the right of property in these lands, of which they can only be deprived by proceedings taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained."

There is another ground upon which the jurisdiction of a court of equity may perhaps be sustained. If we should assume that the appellees acquired a right of way for a canal for irrigating purposes and for the development of power subsidiary thereto, an injunction would seem to be an appropriate remedy to prevent the continuing and threatened use of the right of way thus obtained for other and different purposes and for purposes not authorized by law.

2. Nor is the suit barred by the statute of limitations. The statute upon which the appellees rely provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the issuance of such patents."

The term patent, when applied to a grant of public lands, has well defined meaning. Thus Section 458 of the Revised Statutes provides:

"All patents issuing from the General Land Office shall be issued in the name of the United States and be signed by the President, and countersigned by the Recorder of the General Land Office; and shall be recorded in the office, in books to be kept for the purpose."

It is a well established rule that statutes of limitations do not run against the sovereign, in the absence of some express  
128 statutory provision to the contrary, and if the statute is made applicable to a class of suits only it will not be extended to other cases by implication. It was well known to Congress that grants of public lands are not always made by patent. Indeed, the grant of the right of way in question made by the same act is of that character. And had Congress intended that the bar of the statute should apply, not only to patents but to all legislative grants, it would have so provided in express terms. Again, if this be treated merely as a suit to restrain the unauthorized use or occupation of the forest reserve, the statute can have no application.

3. The rule invoked by the appellees that an appellate court will not disturb the findings of the trial court on disputed questions of fact unless it is clearly manifest that there is no substantial evidence to support them, has little or no application to a case submitted on bill and answer and an agreed statement of facts. Furthermore, there is little room for controversy over the facts in this case. It is apparent that the power company was attempting throughout to obtain a permanent right of way for a canal to be used for power purposes, under an Act of Congress which granted no such right. When the first application was made, the Commissioner of the General Land Office called attention to the two acts, the one granting a right of way for irrigation purposes, and the other for power purposes, and ruled that an application based on the two acts would not be approved. To overcome this objection, doubtless, the proper

officers of the power company certified "that the right of way for said canal was desired solely for the purposes prescribed by the afore-said Acts," referring back to the acts of 1891 and 1898. This certificate was essentially and unqualifiedly false. When the amended application was filed attention was again called to the fact  
129 that the application could not be made under the Act of March 3, 1891, unless the canal as shown by the amended survey was desired for the purposes of irrigation only. To overcome this objection the officers of the power company again certified "that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company might obtain the benefits of Sections 18 to 21, inclusive, of the Act of Congress approved March 3, 1891, entitled 'An Act to repeal timber culture laws, and for other purposes,' and Section 2 of the Act of Congress approved May 11, 1898, and that the right of way described on said map was desired for public purposes." This certificate, while somewhat ambiguous, was doubtless intended to and did convey to the Department the impression that the right of way was authorized by the acts referred to, and was likewise false.

For these reasons, the charge of fraud, in our opinion, is fully sustained, but if we should accept the appellees' view of the case and find that the approval of the Secretary was given with full knowledge of all the facts, it would not avail them, because in that event the Secretary simply exceeded his authority and the validity of his approval may well be challenged in a suit of this kind. Thus, in *United States v. Poland*, decided January 5, 1920, the Supreme Court held that patents issued for more than one hundred and sixty acres in a single body in the Territory of Alaska under soldiers' additional homestead rights, were void, notwithstanding there was no fraud and the patents issued with full knowledge of all the facts.

For the foregoing reasons, we are of opinion that the court below erred, and that the decree should be reversed, with instructions to enter a decree in favor of the United States, cancelling the orders approving the maps and location for the right of way, and en-  
130 joining the appellees from further maintaining their canal on the forest reserve. The operation of the injunction should be suspended for a reasonable time, however, to enable the appellees to make application to the proper Department for such permit or right as is authorized by law.

[Endorsed:] Opinion. Filed April 5, 1920. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.



131 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellee-.

*Decree.*

Appeal from the District Court of the United States for the Southern District of California, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United — for the Southern District of California, Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is reversed, and that this cause be and is hereby remanded to the said District Court with instructions to enter a decree in favor of the United States, cancelling the orders approving the maps and location for the right of way, and enjoining the appellees from further maintaining their canal on the forest reserve. The operation of the injunction should be suspended for a reasonable time, however, to enable the appellees to make application to the proper Department for such permit or right as is authorized by law.

[Endorsed:] No. 3406. United States Circuit Court of Appeals for the Ninth Circuit. United States of America vs. Kern River Company et al. Decree. Filed and Entered April 5, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

Approved and allowed as stipulated statement of the case and bill of exceptions on the appeal, to the Supreme Court of the United States and certified to be full, true and correct, this 4th day of May, 1920.

WM. H. HUNT,

*Judge of the United States Circuit Court  
of Appeals for the Ninth Circuit.*

132 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,

VS.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Defendants and Appellants.

*Petition for Appeal.*

To the Honorable Judges of the above entitled Circuit Court:

The above named defendants feeling aggrieved by the decree rendered and entered in the above entitled cause on the 15th day of April, 1920, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith and they pray that their appeal be allowed and that a citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made, and desiring to supersede the execution of the decree petitioners here tender bond in such amount as the court may require for such purpose and pray that with the allowance of the appeal a supersedeas be issued.

Dated April 26th, 1920.

J. A. GIBSON,

GIBSON, DUNN & CRUTCHER,

*Attorneys for Defendants and Appellants.*

133 Due service of the foregoing petition for appeal is hereby acknowledged.

In the above entitled cause issuance of citation in appeal and service of the same are hereby waived.

Dated this twenty-sixth day of April, 1920.

ROBERT O'CONNOR,

H. P. DECHANT,

*Attorneys for Complainant and Appellee.*

The foregoing petition for appeal having been presented to me and after consideration thereof, it is hereby ordered that said appeal be and the same is hereby granted and allowed.

WILLIAM H. HUNT,

*Judge United States Circuit Court of  
Appeals for the Ninth Circuit.*

Dated: San Francisco, Calif., April 26, 1920.

[Endorsed:] Petition for and Order Allowing Appeal to Supreme Court U. S. Filed April 26, 1920. F. D. Monckton, Clerk.

134 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,

VS.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Defendants and Appellants.

*Assignment of Errors on Appeal.*

Now come the defendants in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 5th day of April, 1920.

I.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree rendered in favor of defendants by the District Court of the United States, Southern District of California, Northern Division, on the 10th day of February, 1919, and in ordering that a decree be entered in favor of the United States cancelling the orders approving the maps of location for the right of way.

II.

That the court erred in enjoining the defendants from further maintaining their canal on the forest reserve right of way.

III.

That the court erred in reversing the finding of the District Court that there was no fraud practiced by the defendants upon the Secretary of Interior and Government land officers in obtaining said grant and in holding that the grant of right of way  
135 obtained by defendants was secured through fraud practiced upon the Government and in decreeing against defendants on that ground.

IV.

That the court erred in decreeing that even though the right of way was granted by the Secretary of Interior with full knowledge

of all the facts and without fraud that the grant was in excess of the authority of the Secretary of Interior and therefore void.

## V.

That the court erred in decreeing that the defendants are operating and maintaining a canal used solely for the purpose of generating, manufacturing and distributing electrical power over a public forest reserve of the United States without obtaining the necessary permit from the Secretary of Interior and without authority of law.

## VI.

That the court erred in decreeing that Sections 18 and 19 of the Act of March 3, 1891 (26 Stats. 1095) and the amendment thereto of May 11, 1898 (30 Stats. 404) applied only to grants of rights of way for irrigation purposes and did not include general power purposes.

## VII.

That the court erred in decreeing that the Attorney General had authority or standing in court to bring action to cancel and annul defendants' right of way without legislative authority from Congress.

## VIII.

That the court erred in decreeing that the suit on behalf of the United States to cancel and annul defendants' patent and to enjoin the use thereof was not barred by Section 8 of the Act of March 3, 1891 (26 Stats. 1095).

## IX.

That the court erred in decreeing that the United States District Court for the Southern District, Northern Division, had jurisdiction of the action brought on behalf of the United States to cancel and annul the grant of defendants' right of way.

## X.

That the court erred in sustaining the ruling of the United States District Court for the Southern District, Northern Division, denying defendants' motion to dismiss the second amended bill of complaint filed October 29th, 1917, in said cause, on the ground that it appeared from said bill that the court had no jurisdiction of the subject matter of said bill, in that there is no legislative provision or law in force to authorize institution of the suit or any action by the court in the premises.

Wherefore, the defendants pray that the said decree of the United States Court of Appeals for the Ninth District be reversed and that said court be ordered to enter a decree in favor of defendants in accordance with the decree rendered by the District Court of the United States in and for the Southern District of California, Northern Division, and to decree that said District Court had no jurisdiction to entertain said action.

J. A. GIBSON,  
GIBSON, DUNN & CRUTCHER,  
*Attorneys for Defendants and Appellants.*

[Endorsed:] Assignment of Errors on Appeal to Supreme Court  
U. S. Filed April 26, 1920. F. D. Monckton, Clerk.

137 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT & POWER Corporation, and Southern California Edison Company, Appellees.

*Stipulation as to Agreed Statement of the Case and Bill of Exceptions on Appeal to the Supreme Court of the United States.*

It is hereby stipulated by and between the parties to the above cause that the agreed statement of the case and bill of exceptions on appeal to the Supreme Court of the United States shall consist of the matter and documents appearing in the transcript of record, on file in this Court, appearing on page 21 to and including page 137 to the words on last said page, viz. "Attorneys for Plaintiff," and also the stipulation appearing on page 138 of said record and dated October 2, 1919, changing the words in all of said documents where required from the words Circuit Court of Appeals of the United States, Ninth Circuit to the words Supreme Court of the United States.

Dated this twenty-sixth day of April, 1920.

ROBERT O'CONNOR,  
H. P. DECHANT,  
*Attorneys for Complainant and Appellee.*  
J. A. GIBSON,  
GIBSON, DUNN AND CRUTCHER,  
*Attorneys for Defendant and Appellant.*

[Endorsed:] Stipulation as to agreed statement of the case and bill of exceptions on appeal to the Supreme Court of the United States.  
Filed April 26, 1920. F. D. Monckton, Clerk.

138 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT & POWER Corporation, and Southern California Edison Company, Appellees.

*Stipulation Waiving Bond on Supersedeas and for Costs on Appeal to Supreme Court U. S.*

It is hereby stipulated by the parties in the above entitled cause that the bond on supersedeas and costs are hereby waived, and that writ of supersedeas may issue on the appeal in the above cause.

Dated this twenty-sixth day of April, 1920.

ROBERT O'CONNOR,

H. P. DECHANT,

*Attorneys for Complainant and Appellee.*

J. A. GIBSON,

GIBSON, DUNN & CRUTCHER,

*Attorneys for Defendant and Appellant.*

[Endorsed:] Stipulation waiving bond on supersedeas and for costs. Filed April 26, 1920. F. D. Monckton, Clerk.

139 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3406.

THE UNITED STATES OF AMERICA, Appellant,

vs.

KERN RIVER COMPANY, a Corporation; PACIFIC LIGHT AND POWER Corporation, and Southern California Edison Company, Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-eight (138) pages, numbered from and including 1 to and including 138, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignments of Errors on Appeal to the Supreme Court of the United States, including the

Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to stipulation of counsel filed April 26, 1920.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of May, A. D. 1920.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,  
*Clerk,*

By PAUL P. O'BRIEN,  
*Deputy Clerk.*

Endorsed on cover: File No. 27,675. U. S. Circuit Court Appeals, 9th Circuit. Term No. 332. Kern River Company, Pacific Light and Power Corporation and Southern California Edison Company, appellants, vs. The United States of America. Filed May 10th, 1920. File No. 27,675.

(1695)

In the District Court of the United States, Southern District of California (Northern Division).

No. A-20. Equity.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

KERN RIVER COMPANY, a Corporation, Defendant.

*Conclusions of the Court.*

There are some very interesting features in this suit. The court is particularly thankful to the attorneys on both sides for the able manner in which they have presented their contentions.

This is a suit in equity, concerning a grant made by the plaintiff to the defendant of a right of way, under the Acts of March 3, 1891, (26 Stats. 1095) and May 11, 1898, (30 Stats. 405).

The defendant was organized for the purpose "of building, constructing, maintaining and operating canals, ditches, reservoirs, etc., for carrying, storing and supplying water for the purpose of irrigation, and for carrying, supplying and storing water for the operation of machinery for the purpose of generating and transmitting electric and other power for the supplying of mines, quarries, railways, tramways, mills and factories with electric and other power and also for the supplying of electric and other power for lighting and heating mines, quarries, mills, factories, incorporated cities and towns, villages, or towns, situated in territory other than the State of Maine, and to acquire by purchase or otherwise, buildings and other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electric and other power and for any of the purposes or uses above mentioned, and to acquire, or possess, contract for, sell and transfer water and water rights, and to contract for, and sell, in the State of California and elsewhere than in the State of Maine, electric and other power for any purpose whatsoever." The Articles of Incorporation were filed with the Government, with the defendant's application for a right of way for a canal, etc., on or about the 3rd day of June, 1898. Which application consisted, among other things, of a certain map of survey, showing the definite location of said proposed canal upon certain portions of the public domain. The map was refiled by defendant on November 3, 1898. The endorsement upon the map stated that the right of way for said canal was desired solely for the purposes prescribed by the aforesaid acts. This map was approved by the Secretary of the Interior on or about the 14th day of April, 1899. The canal was constructed by reason of the authorization so given by said approval, but was not constructed according to the surveys upon said map so approved. And, subsequently, the defendant filed, after the construction thereof, a map with the Government,



showing the final location of said canal along the line of its construction.

It will be more convenient to state other facts, and probably the case will be better understood if other facts are stated, when discussing certain propositions of law arising in the case. The bill prays that the approval of the maps made by the Secretary of the Interior be canceled; that all the proceedings be set aside; that the title of the Government be quieted as against the defendant; and that the defendant be enjoined from using said right of way until it has made application for the same and received the approval of the Secretary of the Interior under the Act of February 15, 1901.

There are two aspects of this bill. One charges fraud perpetrated upon the Government in the application for the grant. The other aspect of the bill relies upon a forfeiture of the grant, by reason of the alleged non-performance by the defendant of the conditions subsequent in the grant or a breach of a continuing covenant.

I will first dispose of the second aspect of the bill as above stated. The plaintiff claims that the defendant's grant gives to the defendant the right to use the right of way, contained in the grant, only for the purpose of irrigation, or "for the development of power as subsidiary to the main purpose of irrigation." The defendant is not using the right of way for irrigation at all and never has so used it, and the plaintiff claims that the grant should be forfeited to the Government for failure to so use said right of way. The plaintiff claims that the grant contains a covenant, either in the form of a condition subsequent that it be so used or as a continuing covenant that it be so used. Conceding that the plaintiff is right in making the contention concerning these covenants, the question arises, can this suit be maintained without an Act of Congress declaring a forfeiture? The Constitution provides that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. In this suit Congress is, by reason of the provision of the Constitution above referred to, the grantor. Congress has control of the rights of the Government in this regard and it has not declared a forfeiture of the grant for the cause under discussion, either in the act, making the grant, or by any other act of Congress.

Section 20 of the Act of March 3, 1891, provides: "That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any incompleated section of said canal," etc. This suit, however, is not brought by reason of the forfeiture declared in that section. The case of the United States v. Whitney, 176 Fed. 593 was a case brought to enforce the forfeiture provided in Section 20, as above quoted, and it is not in point here. The decisions of the Courts, the opinions of the Attorneys General and the Acts of Congress upon this subject are reviewed very thoroughly and ably by Judge Rudkin in United States v. Washington Improvement & Development Company in 189 Fed. 674. The reasoning there and the authorities cited are so convincing and so satisfactory that I do not deem it necessary to go into this matter any further. I.

therefore, hold that as to the aspect of the bill under discussion, the suit cannot be maintained.

As to the first aspect of the bill above referred to, it will be necessary to state additional facts in reference to this question. Was there fraud perpetrated upon the Government by the defendant in its application for the grant? To determine this question, it will be convenient to state here some provisions of the Acts of Congress relative to this matter. Section 18 of the Act of March 3, 1891, provides:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company, formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation," etc.

Subsequently, on May 11, 1898, Congress passed an Act, the second section of which provides:

"That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It is plain that the above quoted provisions of the two statutes must be read together. Section 2 of the Act of 1898 is a modification of the provisions of the Act of 1891. Section 2 above quoted plainly provides for the granting of rights of way for two distinctly separate purposes; that is to say, first, rights of way for ditches, canals and reservoirs granted may be used "for purposes of a public nature"; second, said rights of way granted may be used "for the development of power as subsidiary to the main purpose of irrigation."

The facts concerning the application for the grant and the approval thereof under the above provisions of law are as follows: In 1896, and thus prior to the passage of the Act of 1898, and prior to the organization of the company, a prospectus was issued by a predecessor of the company and by a person who became an engineer of the defendant, which plainly showed that the intent and object of the enterprise was for the generation of electrical energy, and to convey and sell the same to various consumers as far as Los Angeles. There is no evidence that this prospectus was ever called to the attention of the Secretary of the Interior prior to the approval of the rights of way as hereinafter set forth. Thereafter, on September 24, 1897, the defendant wrote to the commissioner of the General Land Office and stated to the commissioner that the company was organized for the purposes of irrigation and the generation and electrical transmission of power, and requesting information concerning the grant

of a right of way over the Sierra Forest Reservation, for a canal, etc. On November 12, 1897, the defendant wrote to the Commissioner of the General Land Office, in which maps and plats were forwarded to the Commissioner. This letter states that an application is made in order that the Kern River Company, organized for the purposes of irrigation and for the generation and distribution of electric power, may obtain the benefits afforded under the Act of Congress, approved March 3, 1891. On April 15, 1898, the Commissioner of the General Land Office wrote a letter to the Register and Receiver of Visalia, concerning this matter, in which the maps, etc., so filed as aforesaid by the company, were rejected. As stated at the beginning hereof, prior to June 3, 1898, the company filed with the Secretary of the Interior copies of its articles of incorporation, which set forth the purposes for which the company was organized, as above referred to. On June 3, 1898, a map of the right of way desired by the defendant was filed under the Act of March 3, 1891, and of May 11, 1898. This is the map that was refiled on November 3, 1898, and upon which map appeared the following representation, "And I further certify that the right of way for said canal is desired solely for the purposes prescribed by the aforesaid acts." In April 14, 1899, the Secretary of the Interior endorsed upon said map his approval of the same. This act of the Secretary of the Interior consummated the grant to the defendant. The construction of the canal was begun in July, 1902. In the meantime the company had acquired a claim to water rights, which entitled it to use the water for irrigation and for the purpose of generating electric power. Some of the notices of appropriation specified that the water was to be used for the purpose of the generation of electric power only. In December, 1904, the defendant entered into an agreement, settling litigation between Miller & Lux and the defendant. This agreement provided that the defendant should not use any water for irrigation, and a decree was entered by the Superior Court of Kern County, California, in said litigation, incorporating said agreement into the decree and enjoining the defendant from using any water out of Kern River for irrigation. On January 19, 1905, the defendant filed a map of an amended location under the Act of March 3, 1891, upon which appeared this representation: "That the company has in all things complied with the Act of Congress of March 3, 1891, granting the rights for canals, ditches, etc., through the public lands of the United States." On July 29, 1905, the Commissioner of the General Land Office wrote to the Register and Receiver of Visalia, concerning the map filed January 19, 1905, as follows: "The company's attention is called to the fact that unless the canal, as shown by amended survey of the amended definite location, is desired for the purpose of irrigation only, the application cannot be granted under the Act of March 3, 1891 (26 Stats. 1095) under which it is filed, but should be filed under the Act of February 15, 1901 (31 Stats. 790), which grants a permission to use the right of way over the public lands for irrigation and other purposes." On September 2, 1905, the map of amended location was refiled by the defendant under the Acts of March 3, 1891, and May 11, 1898, with a second certificate, containing this

representation, "I further certify that the right of way herein described is desired for public purposes." The filing of this second map was for the purpose of getting a right of way over the land where the canal had not been constructed in accordance with the first application. At the time of filing this second map, the defendant abandoned that part of the right of way first above granted in April, 1899, not used by the defendant in constructing this canal.

The fraud relied upon by the plaintiff, though not very specifically pointed out in the bill, evidently consists in the claim made by the plaintiff, as set forth in the first amended bill, that the defendant represented that it desired said rights of way for a canal, reservoirs, etc., to be used by the defendant for the main purpose of irrigation and not otherwise. This is what the attorney for the plaintiff claimed in the argument presenting the case to the court. In the second amended bill filed October 28, 1917, the plaintiff alleges that the defendant represented to the plaintiff, at the time of said application, that the defendant wanted said rights of way for irrigation and public purposes and not otherwise, and that the defendant intended to use said canal solely for the purpose of generating electric power for sale. If the defendant suggested to the plaintiff as a fact that it intended to use said canal, reservoirs, etc., for the main purpose of irrigation and not otherwise, when the defendant did not so intend, it would, of course, be a fraud. Or if the defendant suppressed the fact that it did not intend to use said water for irrigation and represented to plaintiff that it intended to so use it, it would be a fraud. One will look in vain for a suggestion by the defendant to the Department of the fact that it intended to use the canals for the sole purpose of irrigation and in view of the representations made by the defendant at the time of making the applications, it is plain to the Court that the defendant did not suppress the fact that it did not intend to use the right of way for irrigation. When the application was first presented, the defendant intended to use part of the water for irrigation. The facts all the way through show that the defendant intended to use the right of way for the purpose of generating power, and all the representations made to the Secretary of the Interior are consistent with that fact. It is perfectly plain that the defendant did not seek said right of way for canals, for the sole purpose of irrigation, but sought said right of way for the principal purpose of generating power. When the work was completed, and the map, amending the location, was filed, the certificate on the map was that the defendant had complied with the Act of March 3, 1891. The defendant was then informed that unless it intended to use said right of way solely for the purpose of irrigation, the maps could not be approved, and the Department suggested to the defendant that it apply under the Act of February 15, 1901. Then what happened. Did the defendant comply with the suggestion of the Department? Not at all. The defendant refiled the map with the statement "that the right of way herein described is desired for public purposes," that is to say, the defendant wanted to operate under that provision of the Act of 1898, which provided that said right of way for ditches, canals or reservoirs, granted, "may be used for purposes of a public nature."

I cannot construe the certificate of the defendant to mean anything else. It was certainly sufficient to inform the department that the rights of way were not wanted solely for the purpose of irrigation. On November 27, 1905, the Secretary of the Interior endorsed upon the last aforesaid map, the following: "Approved subject to all valid existing rights." This was a confirmation of the grant as then applied for. The bill alleges that when the Secretary of the Interior approved the first map on or about April 14, 1899, he believed and relied upon the representations made, as above set forth, and believed that said canal was to be used by said defendant for the main purpose of irrigation and not otherwise. The bill further alleges that when the Secretary of the Interior on November 27, 1905, approved the second map that he believed and relied upon the representations so made by said applicant as aforesaid, and believed that said canal was to be used by said defendant for irrigation and public purposes, and not otherwise. There is no evidence to show what the Secretary of the Interior believed when he performed said acts as aforesaid. Said allegations in the bill must be supported, if at all, by virtue of the representations above herein set forth. It would seem impossible that the Secretary of the Interior could have been deceived by any of these representations or endorsements upon the maps or anything else that has been proven in this case. It appears to be perfectly plain what the defendant wanted, and the defendant plainly made its representations to the Government. If the representations of the defendant concerning the defendant's desire to use said right of way for public purposes were not sufficient to inform the Secretary of the Interior as to the exact purpose for which the defendant desired said right of way, it seems that it was the duty of the Secretary of the Interior to so inform the defendant. The Secretary of the Interior seemed to be alive to his duties, because previously he had pointed out to the defendant that if the right of way were not to be used solely for the purposes of irrigation, it could not be granted. But, notwithstanding the fact that the defendant declined to so certify, and certified as above stated, that the defendant desired to use said right of way "for public purposes," the Secretary of the Interior approved said map.

The attorney for the plaintiff, in submitting this suit, argued to the court that the Secretary of the Interior had made a mistake of fact. If the Secretary of the Interior supposed that application was made for the main purpose of irrigation, when it was not, it should be regarded as a mistake of fact. The court, however, cannot help but conclude that the Secretary of the Interior knew exactly what the defendant was doing and what it wanted to do, and that no mistake of fact was made. There is no proof submitted to the court in support of the allegations of the bill in this regard, except what may be inferred from the facts hereinabove recited. These facts would not justify the Secretary of the Interior in believing that the canal was to be used for the main purpose of irrigation. The application of the defendant for pole lines, etc., to be apparently used in connection with this project, was before the Secretary of the Interior. Mistake of fact must be proven like any other facts. The court

cannot assume that simply because the Secretary of the Interior acted upon these meagre representations made by the defendant, that the Secretary believed something else aside from what the representations were.

Another point that the plaintiff makes in argument is that the officers had no power to approve an application for a grant for purposes of a public nature. There is no allegation in the bill or suggestion that the Secretary of the Interior was imposed upon concerning this matter, nor is there any allegation in the bill that the defendant is not using the right of way for purposes of a public nature. The entire theory of the bill, as shown by all its allegations, is to the effect that the application was granted solely for irrigation or for irrigation with the subsidiary purpose of development of power. If the plaintiff desired to present in this bill that the defendant practiced a fraud upon the plaintiff, in securing a right of way for a canal for purposes of a public nature, it was the duty of the plaintiff to so allege and present that issue. The bill alleges that the defendant is not using the right of way for irrigation, but it does not allege anywhere that the right of way is not used for purposes of a public nature. There is no allegation in the bill concerning the use to which the defendant is putting the right of way. It is plain that if the plaintiff desired to present the proposition in this suit that there was no power in the Secretary of the Interior to approve the application for the grant, as it was finally submitted to him; that is to say, for public purposes, or, that the Secretary of the Interior misapprehended the law when he approved such application, it was the duty of the plaintiff to set forth the facts concerning said proposition in the bill. Undoubtedly, when the defendant made its application for a right of way for public purposes, it meant that it desired that right of way for purposes of a public nature. In view of the fact that the Secretary of the Interior had suggested that unless the defendant desired said right of way solely for irrigation it could not be granted, that then the defendant sought to take advantage of the provision of law, authorizing a grant for purposes of a public nature. A right of way granted for public purposes certainly would include purposes of a public nature. Undoubtedly, the Secretary of the Interior knew that the defendant was desiring to take advantage of that provision of the law authorizing a grant to be used for purposes of a public nature. The proposition here under discussion is not in issue. It is, however, stipulated by the parties:

"It is further stipulated that defendant has never used said canal for the purpose of irrigation, but has ever used, and now uses, the same solely for the purpose of carrying water to be used to generate electric power, which the said company sells mainly for the purpose of furnishing motor power to certain electric railway systems in and around certain municipalities in said southern division of the southern district of the State of California, and for supplying light for different municipalities throughout said southern district of California and that a part of the electricity generated by the said company is being sold by the said company to farmers and ranchers

along the line of the electric power distributing system of said defendant, which said power is used for the purpose of pumping water to be, and which is, used for irrigating land."

The stipulation as to these facts *is* made in response to the issue tendered by the bill that the right of way was not used for the purpose of irrigation.

There was some argument indulged in at the trial by the parties as to whether or not the use to which the right of way is being put by the defendant is a use of a public nature. It is not necessary for the Court to decide whether or not it is a use of a public nature within the meaning of the Act of May 11, 1898. It is sufficient for the Court to say that the matter here under discussion is not in issue at all. Or, if the grant were made for use of a public nature and it is not being so used, then the question is like the one first discussed by the Court. That is to say, if the defendant secured this right of way for purposes of a public nature and the right of way is not so used, the remedy is by an Act of Congress declaring a forfeiture, and a suit setting forth different facts than are stated in this bill.

Dated this 10th day of February, 1919.

OSCAR A. TRIPPET,

*Judge.*

Form 354. Original. No. A-20 Equity. U. S. District Court, Southern District of California (Northern Division). The United States of America, Plaintiff vs. Kern River Company, a corporation, Defendant. Conclusions of the Court. Filed Feb. 10, 1919. Chas. N. Williams, Clerk. Ernest J. Morgan, Deputy.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original conclusions of the court filed in the Clerk's Office February 10, 1919, in the cause entitled: The United States of America, Plaintiff, vs. Kern River Company, a corporation, Defendant, No. A-20 Equity, Northern Division, as the same remains on file therein.

Attest my hand and the seal of said District Court, this 5th day of April, A. D. 1921.

[Seal of the U. S. District Court, Southern Dist. of California.]

CHAS. N. WILLIAMS,

*Clerk.*

By R. S. ZIMMERMAN,

*Deputy Clerk.*

[Endorsed:] No. A-20 Equity. United States District Court, Southern District of California (Northern Division). The United States of America, Plaintiff, vs. Kern River Company, a corporation, Defendant. Conclusions of the Court.

Supreme Court of the United States, October Term, 1920.

No. 332.

KERN RIVER COMPANY et al., Appellants,

vs.

THE UNITED STATES OF AMERICA.

It is agreed by and between counsel for the respective parties in this case that the foregoing certified copy of conclusions of the District Court of the United of the United States for the Southern District of California may be added to and taken as a part of the transcript of the record in this cause.

J. A. GIBSON,

*For Appellants.*

LESLIE C. GARNETT,

*For Appellee.*

[Endorsed:] File No. 27,675. Supreme Court U. S., October Term, 1921. Term No. 50. Kern River Company et al., appellants, vs. The United States of America. Stipulation of counsel and addition to record. Filed April 25, 1921.